# DOCKET

# SUPREME COURT
OF THE UNITED STATES

No. 09-520
Title: CSX Transportation, Inc., Petitioner
v.
Alabama Department of Revenue, et al.
Docketed: October 30, 2009
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (09-10772)
Decision Date: September 1, 2009
**Questions Presented**

| ---Date--- | ---------Proceedings and Orders---------- |
|---|---|
| Oct 28 2009 | Petition for a writ of certiorari filed. (Response due November 30, 2009) |
| Nov 23 2009 | Waiver of right of respondents Alabama Department of Revenue, et al. to respond filed. |
| Dec 9 2009 | DISTRIBUTED for Conference of January 8, 2010. |
| Dec 15 2009 | Response Requested. (Due January 14, 2010) |
| Jan 13 2010 | Brief of respondents Alabama Department of Revenue, et al. in opposition filed. |
| Jan 25 2010 | Reply of petitioner CSX Transportation, Inc. filed. |
| Jan 27 2010 | DISTRIBUTED for Conference of February 19, 2010. |
| Feb 22 2010 | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| May 14 2010 | Brief amicus curiae of United States filed. |
| May 24 2010 | Reply of petitioner CSX Transportation, Inc. to brief amicus curiae of the United States filed. |
| May 24 2010 | Supplemental brief of respondents Alabama Department of Revenue, et al. filed. (Distributed) |
| May 25 2010 | DISTRIBUTED for Conference of June 10, 2010. |
| Jun 14 2010 | Petition GRANTED limited to the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U. S. C. §11501(b)(4) as 'another tax that discriminates against a rail carrier.'" |
| Jun 22 2010 | Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner. |
| Jun 30 2010 | Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent. |
| Jul 1 2010 | The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 12, 2010. |
| Jul 1 2010 | The time within which to file respondents' brief on the merits is extended to and including September 27, 2010. |
| Aug 12 2010 | Joint appendix filed. (Statement of costs received) |
| Aug 12 2010 | Brief of petitioner CSX Transportation, Inc. filed. |
| Aug 19 2010 | Brief amicus curiae of United States filed. |
| Aug 19 2010 | Brief amicus curiae of Association of American Railroads filed. (Distributed) |

| | |
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| Aug 19 2010 | Brief amicus curiae of Council on State Taxation filed. (Distributed) |
| Aug 19 2010 | Brief amicus curiae of Tax Foundation filed. (Distributed) |
| Aug 20 2010 | CIRCULATED |
| Aug 24 2010 | SET FOR ARGUMENT ON Wednesday, November 10, 2010 |
| Aug 30 2010 | Record for U.S.C.A. for 11th Circuit is electronic and available on PACER |
| Aug 30 2010 | Record for U.S.D.C. for the district of Alabama is electronic and available on PACER |
| Sep 21 2010 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed |
| Sep 27 2010 | Brief of respondents Alabama Department of Revenue filed. (Distributed) |
| Sep 30 2010 | Brief amicus curiae of American Trucking Associations, Inc. filed. (Distributed) |
| Oct 4 2010 | Brief amicus curiae of Multistate Tax Commission filed. (Distributed) |
| Oct 4 2010 | Brief amici curiae of Alabama Education Association, et al. filed. (Distributed) |
| Oct 4 2010 | Brief amici curiae of Washington, et al. filed. (Distributed) |
| Oct 20 2010 | Reply of petitioner CSX Transportation, Inc. filed. (Distributed) |
| Oct 29 2010 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Nov 10 2010 | Argued. For petitioner: Carter G. Phillips, Washington, D.C.; and Melissa A. Sherry, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Corey L. Maze, Solicitor General, Montgomery, Ala. |

# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-09-520 OCT 28 2009

IN THE OFFICE OF THE CLERK

# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND TIM RUSSELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge as "another tax that discriminates against a rail carrier" under section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4).

## PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

## RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly held. No other publicly held company owns more than 10% of petitioner's stock.

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## PETITION FOR A WRIT OF CERTIORARI

CSX Transportation, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) and its order denying hearing en banc (App. 39a) are unreported, as are the orders and opinion of the district court (App. 3a-12a). The controlling opinion of the court of appeals in *Norfolk Southern Railway* v. *Alabama Department of Revenue* is reported at 550 F.3d 1306, and is reproduced here for the Court's convenience (App. 13a-38a).

## JURISDICTION

The court of appeals entered judgment on September 1, 2009. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act") provides, in relevant part:

> § 11501. Tax discrimination against rail transportation property.
>
> (a) In this section—
>
> (1) the term "assessment" means valuation for a property tax levied by a taxing district;
>
> (2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation

subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(a)-(b).

## STATEMENT OF THE CASE

In *Norfolk Southern Railway* v. *Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008), App. 13a-38a, the Eleventh Circuit held that a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is not subject to challenge as "another tax that discriminates against a rail carrier" under section 306(1)(d) of the 4-R Act, 49 U.S.C. § 11501(b)(4). The Eleventh Circuit acknowledged that its interpretation of the 4-R Act directly conflicts with decisions of the Eighth Circuit and the Minnesota Supreme Court. In the present case, the Eleventh Circuit denied a petition for en banc hearing to reconsider *Norfolk Southern*, thus leaving in place the square conflict among the lower courts. Its decision, which raises a fundamental issue regarding the appropriate bounds under the 4-R Act of railroad taxation by all 50 States, is worthy of this Court's review.

### A. Statutory Background

The 4-R Act protects interstate rail carriers "by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads." *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 336 (1994). Congress enacted the prohibition in recognition "that the railroads are easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove themselves from the locality." *Ibid.* (internal quotation marks omit-

ted). The 4-R Act sets forth four forbidden taxation schemes. 49 U.S.C. § 11501(b).

The first three schemes concern *ad valorem* property taxes: (1) assessing railroad property value at a higher ratio to its true market value than the ratio of assessed value to true market value of "other commercial and industrial property"; (2) levying a property tax based on such an assessment; and (3) levying a property tax at a higher rate that that imposed on other "commercial and industrial property." § 11501(b)(1)-(3). These methods of discrimination were commonly practiced by the States prior to enactment of the 4-R Act.

The fourth scheme is: "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." § 11501(b)(4). Subsection (b)(4) "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991). Congress recognized that the temptation to raise revenues on the backs of railroads might be too great to resist, and thus enacted subsection (b)(4) as a prophylactic protection against unfair taxing schemes not encompassed in subsections (b)(1)-(3).

In *ACF Industries*, this Court held that exemptions from a generally applicable *property* tax were not subject to challenge under subsection (b)(4). 510 U.S. at 339-48. As shown below, the lower courts have since divided over whether the same holds for exemptions from a generally applicable *non-property* tax.

### B. Proceedings Below

1. The parties stipulated to all relevant facts. 11th Circuit Expanded Record Excerpts ("ERE") No. 12. Petitioner CSX Transportation, Inc. ("CSXT") is a common carrier railroad engaged in interstate commerce. App. 7a. CSXT operates in Alabama, and is subject to taxation by Alabama and municipalities and subdivisions within the State. *Ibid.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code 40-23-26(c), and a use tax on the storage, use, or consumption of tangible personal property, *id.* § 40-23-60. The sales and use tax, levied at a four percent rate, applies to the railroads' purchase, consumption, or use of diesel fuel in Alabama. App. 7a. Counties and municipalities in Alabama impose additional sales and use taxes, which parallel the state tax, and which likewise apply to the railroads' purchase and use of diesel fuel. *Ibid.* In 2006 and 2007, CSXT paid some $4.1 million and $3.0 million, respectively, in sales and use taxes on its purchase and consumption of diesel fuel in Alabama. *Id.* at 8a n.2. The railroads' principal competitors in Alabama, motor carriers and water carriers, are expressly exempt from sales and use taxes on purchase and consumption of diesel fuel, and therefore paid no such tax. *Id.* at 7a-8a; see Ala. Code §§ 40-17-2(1), 40-23-4(a)(10), 40-23-62(12).

2. On April 18, 2008, CSXT filed suit in federal district court, claiming that, given the exemption granted motor carriers and water carriers, the 4-R Act prohibits Alabama from imposing sales and use tax on CSXT's purchase and consumption of diesel fuel. ERE No. 1. On May 29, 2008, CSXT moved for a preliminary injunction to halt respondent Alabama tax authorities ("Alabama") from enforcing the tax as to CSXT. ERE No. 5. On July 8, 2008, the district

court granted a preliminary injunction, holding that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, it follows that there is reasonable cause to believe that the [4-R] Act has been violated—i.e., the Alabama diesel fuel tax on railroads is discriminatory" under subsection (b)(4). App. 12a.

3. On December 11, 2008, the Eleventh Circuit issued its opinion in *Norfolk Southern Railway* v. *Alabama Department of Revenue*. In that case, another interstate railroad challenged precisely the same Alabama sales and use tax, on precisely the same grounds, as CSXT does here. The Eleventh Circuit rejected the challenge, ruling that exemptions from a generally applicable non-property tax are not even subject to scrutiny, and thus are categorically non-discriminatory, under subsection (b)(4). App. 24a-25a.

The court of appeals noted that its interpretation of subsection (b)(4) was consistent with the majority opinion in *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, 78 F.3d 438, 442-44 (9th Cir. 1996), which also held that subsection (b)(4) did not permit challenges to exemptions from generally applicable non-property taxes. App. 30a-31a & n.14. At the same time, the court acknowledged that its interpretation was inconsistent with *Union Pacific Railroad* v. *Minnesota Department of Revenue*, 507 F.3d 693, 695-96 (8th Cir. 2007); *Burlington Northern, Santa Fe Railway* v. *Lohman*, 193 F.3d 984, 985-86 (8th Cir. 1999); and *Burlington Northern Railroad* v. *Commissioner of Revenue*, 606 N.W.2d 54, 58-59 (Minn. 2000), which "scrutinized exceptions to generally applicable non-property taxes" under subsection (b)(4), and which the Eleventh Circuit rejected as not "persuasive." App. 31a & n.15 (emphasis omitted). Even

though the conflict among the lower courts is clear and unavoidable, the railroad in *Norfolk Southern* did not seek this Court's review of the Eleventh Circuit's holding.

4. Less than a week after the Eleventh Circuit issued *Norfolk Southern*, the district court in this case vacated its preliminary injunction order and dismissed CSXT's complaint "[i]n light of the dispositive Eleventh Circuit's decision." App. 3a. CSXT appealed and, in light of *Norfolk Southern*, sought an initial hearing by the court en banc, which the Eleventh Circuit denied. *Id.* at 39a. Shortly thereafter, the panel affirmed the district court's judgment, recognizing that it was "bound" by *Norfolk Southern*. *Id.* at 2a.

## REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decisions in *Norfolk Southern* and below deepen a conflict in the lower courts over the scope of § 306(1)(d) of the 4-R Act, 49 U.S.C. § 11501(b)(4). Two circuits have held that a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is not subject to challenge under subsection (b)(4) as "another tax that discriminates against a rail carrier." Another circuit and two state courts of last resort have held the opposite. This is precisely the kind of conflict that this Court routinely grants certiorari to review. See, *e.g.*, *CSX Transp., Inc.* v. *Ga. State Bd. of Equalization*, 128 S. Ct. 467, 471-72 (2007); *ACF Indus., Inc.*, 510 U.S. at 337-38. Moreover, this case presents an ideal vehicle to resolve the conflict.

## I. THERE IS AN ACKNOWLEDGED CONFLICT AMONG THE LOWER COURTS ON THE QUESTION PRESENTED.

The Eleventh Circuit in *Norfolk Southern* held that exemptions to generally applicable non-property taxes are not subject to challenge under § 11501(b)(4), even where railroads are taxed and competitors to railroads are exempt. App. 28a-32a; *accord id.* at 2a. In so holding, the court of appeals relied exclusively on *ACF Industries*, where this Court ruled that property tax exemptions are not subject to challenge under subsection (b)(4). 510 U.S. at 339-48. According to the Eleventh Circuit, *ACF Industries* "is equally applicable" to non-property tax exemptions. App. 29a. The Eleventh Circuit's ruling is in accord with *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, where the Ninth Circuit read subsection (b)(4) in the same restrictive manner. 78 F.3d at 443 ("Although *ACF* specifically addressed property tax exemptions, the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions.").

The decisions of the Ninth and Eleventh Circuits directly conflict with two decisions of the Eighth Circuit. In *Burlington Northern, Santa Fe Railway* v. *Lohman*, the Eighth Circuit held that non-property tax exemptions are subject to challenge under subsection (b)(4), and invalidated a Missouri statute subjecting railroads, but not "their direct competitors," to "a generally imposed nonproperty tax." 193 F.3d at 986. The Eighth Circuit adhered to its interpretation of subsection (b)(4) in *Union Pacific Railroad* v. *Minnesota Department of Revenue*, which invalidated a Minnesota statute imposing a generally applicable sales and use tax on fuel consumption by railroads, while exempting motor carriers and air

carriers. 507 F.3d at 695-96. See also *ATSF Ry.*, 78 F.3d at 444 (Nielsen, J., dissenting) (contending that railroads may invoke subsection (b)(4) to challenge scheme that imposes transaction privilege tax and use tax on railroads while exempting motor carriers).

Two state courts of last resort have expressed the same view of subsection (b)(4). In *Burlington Northern Railroad* v. *Commissioner of Revenue*, the Minnesota Supreme Court expressly rejected the State's argument that *ACF Industries* immunized non-property tax exemptions from scrutiny under subsection (b)(4). 606 N.W.2d at 58-59. And, in *Atchison, Topeka & Santa Fe Railway* v. *Bair*, 338 N.W.2d 338, 346-48 (Iowa 1983), the Iowa Supreme Court held invalid under subsection (b)(4) a statutory scheme that exempted the railroads' competitors from a fuel excise tax applied to railroads. *Accord, e.g.*, *Kan. City S. Ry.* v. *Bridges*, 2007 WL 977552 (W.D. La. Mar. 30, 2007) (invalidating under subsection (b)(4) the imposition of Louisiana sales and use tax on the railroads' use and consumption of fuel, given the exemption of motor carriers and water carriers).

This conflict over the scope of subsection (b)(4) is unquestionably worthy of this Court's review. The conflict is particularly stark between the Eleventh Circuit's decisions below and in *Norfolk Southern* and the Eighth Circuit's decisions in *Lohman* and *Union Pacific*. In all four cases, a railroad challenged under subsection (b)(4) a State's generally applicable sales and use taxes on diesel fuel because railroads were taxed while their direct competitors were exempt. Yet the courts reached diametrically opposed conclusions: while Alabama's discriminatory taxation scheme continues unabated, Missouri's and Minnesota's have been enjoined.

The States' ability to tax—and, more fundamentally, whether non-property tax exemptions are subject to challenge under subsection (b)(4) in the first place—should not depend solely on the Circuit in which the State happens to be located. This Court should grant review to resolve this fundamental and acknowledged conflict over the provision's scope.

## II. THE ELEVENTH CIRCUIT'S DECISION MISINTERPRETS THE 4-R ACT AND CONFLICTS WITH THIS COURT'S DECISIONS.

This Court ruled in *ACF Industries* that exemptions from generally applicable property taxes are not subject to challenge under § 11501(b)(4). 510 U.S. at 347-48. The Eleventh Circuit construed *ACF Industries* as foreclosing challenge not only to property tax exemptions, but to exemptions from generally applicable non-property taxes as well. App. 26a-32a; see also *id.* at 2a (adhering to *Norfolk Southern*). The court's ruling misinterprets a precedent of this Court and, in so doing, improperly curtails the protection Congress intended to provide railroads under § 11501(b)(4). That the Eleventh Circuit erred reinforces the need for this Court's review, both to provide uniformity in the law and to promote Congress's clear intent in passing the 4-R Act.

The plaintiff in *ACF Industries* claimed that Oregon violated subsection (b)(4) "by imposing an ad valorem tax upon railroad property while exempting various other, but not all, classes of commercial and industrial property." 510 U.S. at 335. To decide whether the claim was cognizable under subsection (b)(4), this Court examined the interplay between that provision, which prohibits States from imposing "another tax that discriminates against a rail carrier providing transportation," 49 U.S.C. § 11501(b)(4),

and subsections (b)(1)-(3), which focus expressly on discriminatory property taxes.

The Court first addressed subsections (b)(1)-(3). *ACF Indus.*, 510 U.S. at 340-43. Those provisions prohibit a State or municipality from imposing a tax rate or assessment ratio on railroads that exceeds the rate or assessment ratio applied to other "commercial and industrial property." 49 U.S.C. § 11501(b)(1), (3). The term "commercial and industrial property," in turn, means "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*." § 11501(a)(4) (emphasis added). It follows, the Court reasoned, that a railroad may challenge a tax rate or assessment ratio under subsections (b)(1)-(3) as exceeding the rate or assessment ratio applied to other "'commercial and industrial property'" only if that other property was actually "'subject to a property tax levy.'" 510 U.S. at 341-42. Because property exempted from taxation is not "'subject to a property tax levy,'" the Court concluded that "railroads may not challenge property tax exemptions under" subsections (b)(1)-(3). *Id.* at 342.

That conclusion, the Court explained, impacts the scope of subsection (b)(4). Recognizing that it "must pay heed to the fact that Congress placed exempt property beyond the reach of subsections (b)(1)-(3)," the Court held that it "would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." *Id.* at 343. Accordingly, the Court ruled that "[t]he structure of § [11501] ... warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property

while exempting various classes of nonrailroad property." *Ibid.*

*ACF Industries* does not govern exemptions from non-property taxes. The Court's holding that property tax exemptions are immune from scrutiny under subsection (b)(4) rests entirely on the conclusion that such exemptions are "beyond the reach of subsections (b)(1)-(3)." *Ibid.* That conclusion, in turn, rests entirely on the fact that the comparison class in subsections (b)(1)-(3)—other "'commercial and industrial property'"—excludes exempt property. *Id.* at 341-42. This plain congressional intent to immunize exemptions from scrutiny is unique to property taxes, and has no bearing whatsoever on non-property taxes like the sales and use taxes at issue here. Because nothing in subsections (b)(1)-(3) reflects a decision to freely permit non-property tax exemptions, and because nothing in subsection (b)(4) reflects a decision to permit *any* exemptions, it would not "subvert the statutory plan" to permit railroads to challenge discriminatory non-property tax exemptions under subsection (b)(4). *Id.* at 340.

To the contrary, it would subvert the statutory plan to preclude such challenges.

> Although Congress was long concerned with blatant property-tax discrimination by many states, it realized near the end that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation. Congress therefore added § [11501(b)(4)] to ensure that the statute would not fail of its broader purpose.

*Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987).

The point is illustrated by *Burlington Northern, Santa Fe Railway* v. *Lohman*, which concerned a Missouri scheme that imposed a generally applicable sales and use tax on the railroads' purchase and use of diesel fuel while exempting trucks and barges, the railroads' major competitors. 193 F.3d at 985. The Eleventh Circuit's reading of subsection (b)(4) would immunize Missouri's scheme from challenge, thereby placing the railroads "at a competitive disadvantage that would defeat the purpose of the statute—financial stability." *Id.* at 986. At the same time, the Eleventh Circuit's view would permit a subsection (b)(4) challenge to a lesser form of discrimination—for instance, imposing a four percent sales and use tax on the railroads, and a two percent sales and use tax on trucks and barges. There is no basis in the text or structure of § 11501 for, and it is inconceivable that Congress intended, such a result.

This is the second time in three years that the Eleventh Circuit has misconstrued the scope of *ACF Industries*. See *CSX Transp., Inc.* v. *State Bd. of Equalization*, 472 F.3d 1281, 1288-90 (11th Cir. 2006), *rev'd*, 128 S. Ct. 467 (2007). In the process, along with the Ninth Circuit in *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, the Eleventh Circuit has created a square conflict among the lower courts. This Court correctly granted certiorari in *CSX Transportation* and reversed, and it should do the same here.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed September 1, 2009]

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No. 09-10772
Non-Argument Calendar

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D. C. Docket No. 08-00655-CV-UWC-S

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CSX TRANSPORTATION, INC.,
*Plaintiff-Appellant,*

versus

ALABAMA DEPARTMENT OF REVENUE,
TIM RUSSELL, Commissioner of the
Alabama Department of Revenue,
*Defendants-Appellees.*

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(September 1, 2009)

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Appeal from the United States District Court
for the Northern District of Alabama

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Before BLACK, BARKETT, and HILL, *Circuit Judges.*

PER CURIAM:

CSX Transportation, Inc. (CSXT) appeals the one-page order of the district court dated December 16, 2008, dissolving its preliminary injunction from the

imposition of Alabama's sales and use tax on diesel fuel. The district court *sua sponte* dismissed CSXT's case on the basis that *Norfolk Southern Railway Co. v. Alabama Dept. of Rev.*, 550 F.3d 1306 (11th Cir. 2008) was dispositive.

CSXT asserts that the sales and use tax on diesel fuel discriminates against railroad companies in violation of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4) (Section 306). CSXT concedes that the *Norfolk Southern* panel considered an identical challenge by the Norfolk Southern railroad to the sales and use tax on railroad diesel fuel under Section 306, and ruled in favor of the Alabama revenue department.

CSXT further concedes that the three-judge panel assigned to hear this appeal is bound by the panel's decision in *Norfolk Southern*.[1] We agree. We affirm the judgment of the district court. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

AFFIRMED.

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[1] CSXT filed a petition for hearing *en banc* of this case, pursuant to Rule 35 of the Federal Rules of Appellate Procedure. No judge in regular service in this court requested that the court be polled on hearing *en banc*; the petition for hearing *en banc* has been denied.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed 12/16/2008]

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Civil Action Number
2:08-cv-0655-UWC

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CSX TRANSPORTATION, INC.,
*Plaintiff,*

vs.

ALABAMA DEPARTMENT OF REVENUE
and TIM RUSSELL, in his official capacity as
Commissioner of the Alabama
Department of Revenue,
*Defendants.*

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ORDER DISSOLVING PRELIMINARY
INJUNCTION AND DISMISSING CASE

In light of the dispositive Eleventh Circuit's decision in *Norfolk Southern Railway Co. v. Alabama Dept. of Revenue*,___ F.3d ___ (11th Cir.2008), 2008 WL 5173113, the Preliminary Injunction previously entered herein, Doc. 14, is hereby DISSOLVED.

This case is hereby DISMISSED, with prejudice.

The costs of this action are hereby assessed against the Plaintiff.

/s/ U.W. Clemon
U.W. Clemon
United States District Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed 07/08/2008]

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Civil Action Number
2:08-cv-0655-UWC

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CSX TRANSPORTATION, INC.,
*Plaintiff,*

vs.

ALABAMA DEPARTMENT OF REVENUE
and TIM RUSSELL, in his official capacity as
Commissioner of the Alabama
Department of Revenue,
*Defendants.*

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PRELIMINARY INJUNCTION

Consistent with the accompanying Memorandum Opinion, and upon the finding that there is reasonable cause to believe that the Defendants' assessment, levying, and collection of sales and use taxes on diesel fuel purchases and use by the Plaintiff is discriminatory, it is hereby ORDERED that the Defendants ALABAMA DEPARTMENT OF REVENUE, and TIM RUSSELL, in his official capacity as Commissioner of the Alabama Department of Revenue, their agents, managers, supervisors, employees, and those in active concert and/or participation with them who receive actual notice of this Order by publication or otherwise, be and the same are hereby.

PRELIMINARILY ENJOINED AND RESTRAINED from assessing, levying, and/or collecting taxes on diesel fuel purchases and use by the Plaintiff CSXT, Inc., pending a trial and determination on the merits of Plaintiff's cause of action.

As a condition of this Preliminary Injunction, the Plaintiff shall pay the disputed tax funds into an Escrow Fund, to be established at a financial institution mutually agreed to by the parties, pending final resolution of this action.

A copy of this Preliminary Injunction shall be served by the United States Marshal on each of the Defendants or their authorized agents.

Done the 8th day of July, 2008.

/s/ U.W. Clemon
U.W. Clemon
United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed 07/08/2008]

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Civil Action Number
2:08-cv-0655-UWC

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CSX TRANSPORTATION, INC.,
*Plaintiff,*

vs.

ALABAMA DEPARTMENT OF REVENUE
and TIM RUSSELL, in his official capacity as
Commissioner of the Alabama
Department of Revenue,
*Defendants.*

---

## MEMORANDUM OPINION ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Under 49 U.S.C. § 11501(b)(4), Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Plaintiff CSX Transportation Inc. ("CSXT") seeks a preliminary injunction against Defendants Alabama Department of Revenue ("the Department") and Revenue Commissioner Tim Russell's assessment, levy, and collection of a state tax the purchase or use of diesel fuel in this State. For the reasons which follow, the Court finds and concludes that the injunction should issue.

I

CSXT is a Virginia Corporation with its principal place of business in Jacksonville, Florida. It is engaged in interstate commerce as a common carrier by railroad. The Department has the responsibility of administering and collecting Alabama state taxes, including the administration of sales and use taxes. Commissioner Russell ("the Commissioner"), sued only in his official capacity, exercises general supervision over the Department.

Alabama imposes a general sales tax on the gross receipts of retail businesses. *See* ALA. CODE § 40-23-26(c)(2003 Repl.). Even though the tax is collected from retailers, it is considered a direct tax on the consumer. ALA CODE. § 40-23-26(c). Alabama also imposes a use tax on the storage, use, or consumption of tangible personal property in Alabama. ALA. CODE. § 40-23-60.

Under Alabama law, railroads are subject to a four percent (4%) sales or use tax on either their purchase, consumption, or use of diesel fuel in Alabama. This tax is assessed and collected by the Department. Moreover, counties and municipalities in Alabama may impose additional sales and use taxes which parallel the sales and use tax imposed by the State. Revenues from the sales and use taxes are deposited in the Alabama state treasury for the general revenue fund. ALA. CODE §§ 40-23-35 [sic].

The principal competitors to rail carriers in the transportation of interstate commerce in Alabama are on-highway motor carriers and water carriers (ships, barges, and other vessels.)[1] Water carriers are

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[1] Air carriers also transport property in interstate commerce within the State of Alabama, but due to the relatively small size

exempt from diesel fuel sales or use taxes. Motor carriers likewise are not subject to diesel fuel sales and use taxes.

Fuel costs incurred in the transportation of property in interstate commerce are a major annual operating expense of rail carriers, motor carriers, and water carriers[2].

Beginning in November 2007, CSXT discontinued paying sales and use taxes on diesel fuel in Alabama. On January 2, 2008, it notified the Department and appropriate county and municipal officials of its decision.

On May 30, 2008, the Shelby County Business Revenue office sent to CSXT a notice that it had been assessed $107,243.99 as use taxes on estimated diesel fuel purchases, due payable within thirty days.

This action was commenced on April 14, 2008.

II

Two issues are presented for the Court's consideration. The first issue is whether, under the "4-R Act," the proper comparator class for determining discriminatory taxation *vel non* is the "other commercial

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and weight of air-transported property, the competition with rail carriers is marginal.

[2] For the ears 2006 and 2007, CSXT paid the following sales and use taxes on its purchases of diesel fuel in Alabama:

| Year | State taxes | City/County taxes | Total |
|---|---|---|---|
| 2006 | $1,898,649.88 | $2,209,650.56 | $4,108,300.44 |
| 2007 | $1,511,052.84 | $1,511,238.80 | $3,022,291.64 |

Doc. 11, Motion for Leave to File Supplement, Exh. I, Affidavit of Vickie Friedman, p. 2.

and industrial taxpayers" standard or the "competitive mode class," *i.e.*, CSXT's direct competitors. The second is whether there is "reasonable cause to believe" that the challenged diesel fuel tax discriminates against CSXT .

A. The Comparison Class

The 4-R Act provides, in relevant part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> 1 Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> 2 Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> 3 Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> 4 Impose another tax that discriminates against a rail carrier providing transportation. . . .

49 U.S.C. § 11501(B).

The Supreme Court has noted the remedial purpose of the statute:

> Congress enacted the 4-R Act in part to "restore the financial stability of the railway system of the United States." § 101(a), 90 Stat. 33. When drafting the legislation, Congress was aware that the railroads "'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." Western Air Lines, Inc. v. Board of Equalization of S.D., 480 U.S. 123 (1987) (quoting S. Rep. No. 91-630, p.3 (1969)).

*Dept of Revenue v. ACF Indus. Inc.*, 510 U.S. 33[2], 336 (1994).

In seeking to protect the Railroads from discrimination, the 4-R Act, in subsections 306(1)(a) through (1)(c), specifically refers to taxes on other "commercial and industrial property" as the proper comparator class. *See* attached § 306. This limitation, however, is not included in subsection 306(1)(d), which is at issue here and which "is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means." *Alabama Great Southern Railroad Company v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981) (citing *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981) (emphasis added).

Therefore, in order to determine whether the Alabama tax here is discriminatory, it is first necessary to determine the proper comparator class, i.e., whether the tax on the railroad should be compared to taxes levied on other commercial and industrial

taxpayers or whether it should be compared only to the taxes levied on the railroad's competitors.

A. The Comparison Class

While the circuits are split,[3] and the Eleventh Circuit has not directly addressed the issue, it seems to the court that the better view is that of the Eighth Circuit.

First, if Congress had intended to limit the operation of subsection 4 to "commercial or industrial" classes, it easily could have done so—as it did in the preceding three subsections.

Moreover, the utilization of the competitive mode class furthers the remedial purpose of the R-4 Act by affording maximum protection to railroads from discriminatory taxation. As *Lohman* points out: "if too

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[3] *See, Atchison, Topeka, and Santa Fe Ry. Co. v. State of Arizona,* 78 F.3d 438 (9th Cir. 1996), where the Ninth Circuit held that "the comparison class of 'commercial and industrial taxpayers subject to the tax' must be used in analyzing the Arizona tax scheme because a narrow comparison class, comprised only of "motor carriers," would result in preferential treatment for railroads." *Id.* at 442. The Fifth Circuit agrees. *See, Kansas City S. Ry. v. Mcnamara,* 817 F.2d 368, 375 (5th Cir. 1987). Judges in the Middle District of Alabama and a magistrate judge of this court have also adopted the "commercial and industrial mode" as the appropriate class. *See, Alabama Great Southern Railway Co. v. Eagerton,* 541 F. Supp 1084, 1085 (M.D. Ala. 1982); *Burlington Northern Sante Fe Ry. Co. v. Monroe,* No. 97-D-1754-N, M.D. Ala (August 10, 1998); *Norfolk Southern Ry. Co. v. Alabama Department of Revenue,* N.D. Ala. No. 2:08-cv-00285-HGD, N.D. Ala, Doc. 17, p.20.

On the other hand, the Eighth Circuit, in *Burlington Northern Santa Fe Ry. Co. v. Lohman,* 193 F.3d 984 (8th Cir. 1999), *cert. denied,* 529 U.S. 1098 (2000), held that the appropriate comparison class should be comprised of the railroad's direct competitors, characterized as "the competitive mode class."

broad of a comparison class is chosen, the railroads will be placed at a competitive disadvantage that would defeat the purpose of the statute—financial stability." *Burlington Northern Santa Fe Ry. Co. v. Lohman,* 193 F.3d at 986.

Finally, our circuit has given considerable deference to the Eighth Circuit in other cases interpreting the R-4 Act. *See, Eagerton, supra,* 633 F.2d at 1040; *Department of Revenue, State of Florida v. Trailer Train Company,* 830 F.2d 1567, 1572 (11th Cir. 1987).

In any event, the Department has conceded that "[i]n the instant case, no matter how the 'comparison class is framed, the comparison class consists of motor carriers and water carriers." Doc. 9, Response to Plaintiff's Request for Injunctive Relief, p. 5.

B. Reasonable Cause

Because the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, it follows that there is reasonable cause to believe that the R-4 Act has been violated—i.e., the Alabama diesel fuel tax on railroads is discriminatory. *Burlington Northern Santa Fe Ry. Co. v. Lohman,* 193 F.3d 983 (8th Cir. 1999).

Conclusion

CSXT is entitled to the preliminary injunction it seeks. By separate order, it will issue.

Done the 8th day of July, 2008.

/s/ U.W. Clemon
U.W. Clemon
United States District Judge

## APPENDIX E

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

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No. 08-12712.

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NORFOLK SOUTHERN RAILWAY COMPANY,
*Plaintiff-Appellant,*

v.

ALABAMA DEPARTMENT OF REVENUE,
Tim Russell, Commissioner of Revenue,
*Defendants-Appellees.*

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Dec. 11, 2008.

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Appeal from the United States District Court
for the Northern District of Alabama.

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Before BARKETT and WILSON, *Circuit Judges*, and POGUE,* *Judge*.

POGUE, Judge:

Norfolk Southern Railway Company ("Norfolk") appeals an order denying its application for preliminary injunctive relief from the imposition of Alabama's sales and use tax on diesel fuel. Norfolk asserts that the sales and use tax on diesel fuel discriminates against railroad companies in violation of Section

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* Honorable Donald C. Pogue, of the United States Court of International Trade, sitting by designation.

306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), currently codified as 49 U.S.C. § 11501(b)(4).

We affirm the district court's denial of a preliminary injunction. *Norfolk S. Ry. v. Ala. Dep't of Revenue*, Civil Action No. 2:08-cv-00285-HGD, slip op. at 33 (N.D.Ala. Apr. 9, 2008). Before we explain the reasons for that affirmance, however, we will first outline the tax provisions Norfolk challenges, briefly review the purpose and text of the 4-R Act, and summarize the proceedings below; we will then explain our conclusion that Alabama's tax does not violate the 4-R Act.

## I

Though Norfolk is a Virginia railway corporation, it is qualified to do business in Alabama and has approximately a one-third market share among Alabama rail carriers. While Norfolk's operations extend across twenty-two states, it owns its rights-of-way and builds, maintains, and repairs its tracks and other structures in Alabama, and is therefore subject to taxation there.

Pursuant to ALA.CODE §§ 40-23-1 to -213 (2008), Alabama levies a "sales tax" on the gross receipts of retail entities selling tangible personal property within the state,[1] *id.* § 40-23-2(1), and a "use tax" on the storage, use, or consumption of tangible personal property in the state. *Id.* § 40-23-61(a). The tax is levied at a rate of four percent of the purchase price. *Id.* §§ 40-23-2(1), -61(a). After the payment of administrative and enforcement expenses, and small payments to other state funds, Alabama deposits the

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[1] Although in reality collected from retailers, the sales tax is "conclusively . . . presumed to be a direct tax on the retail consumer." *Id.* § 40-23-26(c).

sales and use tax proceeds into its Education Trust Fund. *Id.* §§ 40-23-35(a) to -35(f), -85. Further, a number of Alabama cities and counties levy local sales and use taxes at varying rates. *Norfolk S. Ry.*, Civil Action No. 2:08-cv-00285-HGD, slip op. at 5. Norfolk must pay these state and local sales and use taxes on its purchase, consumption, or use of diesel fuel.[2] According to expert testimony, after capital improvements and compensation, diesel fuel constitutes Norfolk's third-highest business expense.

By and large, Norfolk's main competitors[3] do not pay Alabama's sales and use tax on the diesel fuel

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[2] Although not at issue here, we note that Norfolk also pays state ad valorem tax on its Alabama property (e.g., track, roadway structures, and roadbeds) and pays sales and use tax on the materials used to build, maintain, and repair its property. As motor carriers, air carriers, and water carriers do not own, build, or maintain roads, airports and airspace, or ports and waterways, such carriers do not pay sales and use tax or ad valorem tax in this manner. We note also that if Norfolk buys diesel fuel in other states, it still must pay use tax on the sales price or reasonable market value of the fuel used, unless it has already paid equal or greater amounts of sales tax in the other states. *See* ALA.CODE §§ 40-23-61(e), -65.

[3] The parties agree that Norfolk's direct competitors are "on-highway motor carriers of property in interstate commerce" ("motor carriers") and "carriers of property in interstate commerce by ships, barges, and other vessels" ("water carriers"); air carriers only marginally compete with rail carriers. *Norfolk S. Ry.*, Civil Action No. 2:08-cv-00285-HGD, slip op. at 4. The parties seemingly agree that these direct competitors, or the "competitive mode," serve as the proper "comparison class" for section (b)(4). Courts are split on the issue of the proper "comparison class." *Compare CSX Transp., Inc. v. Ala. Dep't of Revenue*, Civil Action No. 2:08-cv-00655-UWC, slip op. at 6-7 & n.3 (N.D.Ala. July 8, 2008) (applying "competitive mode" comparison class, consisting of railroad's "direct competitors"), *and Union Pac. R.R. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir.2007)

they purchase or consume. Rather, so long as motor carriers pay Alabama's motor fuel excise tax, at a total of $0.19 per gallon, such entities do not pay the sales and use tax on diesel fuel. *Id.* §§ 40-17-2(1) (imposing $0.13 per gallon on motor fuel; having paid this tax, motor carriers are "not subject to any other excise tax levied by the state"), -220(e) (imposing upon distributors and suppliers an additional excise tax of $0.06 per gallon on motor fuel received from a terminal, refinery, barge, or pipeline), -220(j).[4] Notably, however, motor carriers are not exempt from the sales and use

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(same), *and Ka. City S. Ry. v. Bridges*, No. 04-2547, 2007 U.S. Dist. LEXIS 23477, at *21-22 (W.D.La. Mar. 30, 2007) (same), *and Burlington N. R.R. v. Comm'r of Revenue*, 509 N.W.2d 551, 553 (Minn.1993) (same), *with Burlington N. Santa Fe Ry. v. Monroe*, Civil Action No. 97-D-1754-N, slip op. at 21 (M.D.Ala. Aug. 10, 1998) (applying comparison class of other "commercial and industrial taxpayers"), *and Atchison Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 441 (9th Cir.1996), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996) (same), *and Ka. City S. R.R. v. McNamara*, 817 F.2d 368, 375, 376 n. 15 (5th Cir.1987) (same), *and Ala. Great S. R.R. v. Eagerton*, 541 F.Supp. 1084, 1086 (M.D.Ala.1982) (same). The Supreme Court in dicta has applied the "other commercial and industrial taxpayers" category to challenges to state taxes under section (b)(4). *See Dep't of Rev. v. ACF Indus., Inc.*, 510 U.S. 332, 335, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). In any event, as we find that the subject tax is generally applicable in accordance with *ACF Industries*, we need not determine the appropriate "comparison class" here.

[4] Rail carriers do not pay fuel excise tax on their purchase or consumption of diesel fuel. *Id.* §§ 40-17-2(1) ("motor fuel subject to the excise tax levied by this article shall not be subject to any other excise tax levied by the state"), -220(d)(2), -220(e) ("where any excise tax imposed by this section shall have been paid to the state by a distributor or supplier the payment shall be sufficient, the intent being that the tax shall be paid to the state but once").

tax if they do not pay the motor fuel excise tax on diesel fuel. *See id.* § 40-17-2(1).[5] Alabama spends its fuel excise tax proceeds on the construction, repair, and maintenance of public highways, *id.* §§ 40-17-13(4), -146, -222, as well as on costs of tax collection and bonds previously issued to build roads. *Id.* § 40-17-13.

In addition, Alabama levies a gasoline tax at a rate of $0.12 per gallon on gasoline intended for use in internal combustion engines. *Id.* § 40-17-31(a) (imposing an excise tax of $0.07 per gallon and a supplemental excise tax of $0.05 per gallon). An additional excise tax of $0.04 per gallon also applies to gasoline. *Id.* § 40-17-220(a)-(b). Alabama spends the proceeds from the gasoline taxes to maintain highways and streets. *Id.* §§ 40-17-31(c)(2), -223. Moreover, motor carriers are also subject to a motor *carrier* fuel excise tax equal to the applicable gasoline or diesel fuel tax, but they receive credit as to their motor carrier fuel excise tax bill for gasoline or diesel fuel tax already paid on the subject gasoline or diesel fuel. *Id.* §§ 40-17-141, -142(a).[6]

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[5] Norfolk argues that "there is no evidence that motor carriers pay anything other than the excise tax." App.'s Br. 5 n.3. However, Norfolk has not cited the court to the record, nor did Norfolk present any evidence before the trial court on this issue.

[6] Section 40-17-141 reads that "[e]very motor carrier shall pay an excise tax upon motor fuels used in its operations within this state at the same tax rate per gallon as . . . the gasoline tax and diesel fuel tax." Section 40-17-142(a) indicates that "[e]very motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to the rate per gallon of the applicable Alabama tax on motor fuel which is currently in effect on all motor fuel purchased by such motor carrier within this state for use in its operations either within or without this state and upon which the motor fuel tax has been paid by such

Interstate and international water carriers are also exempt from the sales and use tax on fuel. *Id.* §§ 40-23-4(a)(10), -62(12). While *intrastate* water carriers must pay sales and use taxes on fuel, Norfolk insists that intrastate water carrier shipments constitute only a small portion (according to one of Norfolk's trial exhibits, only about one million of approximately 194 million tons of intrastate shipments) of its competition within Alabama.

II

Norfolk challenges Alabama's levy of sales and use tax on diesel fuel under the 4-R Act. Congress passed the 4-R Act in 1976:

> "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." § 101(a). Among the means chosen by Congress to fulfill these objectives, particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property. After an extended period of congressional investigation, Congress concluded that "railroads are over-taxed by at least $ 50 million each year." H.R.Rep. No. 94-725, p. 78 (1975). . . .
>
> In broad terms, Congress declared in § 306(b) that assessment ratios or taxation rates imposed on railroad property which differ significantly from the ratios or rates imposed on other commercial and industrial property are prohibited as burdens on interstate commerce. Section

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motor carrier." Thus, it appears that motor carriers do not pay the motor carrier fuel tax so long as they pay either the applicable gasoline or applicable diesel fuel taxes.

306(c) declared an exception from the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, allowing railroads to challenge discriminatory taxation in federal district courts.

*Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 457, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987) (footnotes omitted).

Consistent with its purpose, the text of the 4-R Act focuses primarily on discriminatory property taxation, but it also includes a broader prohibition in section 11501(b)(4). In current form, 49 U.S.C. § 11501[7] reads:

(a) In this section—

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

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[7] The original language of the relevant portion of the Act, section 306, was originally codified as 49 U.S.C. § 26c. *CSX Transp., Inc. v. Ga. State Bd. of Equalization*,—U.S.—, n. 1, 128 S.Ct. 467, 470 n. 1, 169 L.Ed.2d 418 (2007). In 1978, section 306 was recodified, without any intended substantive change, at 49 U.S.C. § 11503. *Id.*; Act of Oct. 17, 1978, Pub.L. No. 95-473, Ch. 15, 92 Stat. 1337, 1445-46, 1466 (1978). In 1995, Congress again recodified section 306, without substantive change, as 49 U.S.C. § 11501. *Ga. State Bd. Of Equalization*, 128 S.Ct. at 470 n. 1; Act of Dec. 29, 1995, Pub.L. No. 104-88, § 102(a), 109 Stat. 803, 843-44 (1995).

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the

United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Similar to other jurisdictions, this circuit interprets section 11501(b)(4) as a "catchall" that prevents all forms of discriminatory taxes, property or otherwise. *See Ala. Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir.1981). *See also Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 339-40, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994) (reading section (b)(4) broadly to include discriminatory property taxes, indirectly indicating that (b)(4) also prevents discriminatory non-property taxes).

III

On February 19, 2008, Norfolk filed suit in the United States District Court for the Northern District of Alabama, challenging the imposition of Alabama's sales and use tax on its diesel fuel, and seeking declaratory in addition to preliminary and permanent injunctive relief. Norfolk's complaint alleged that "[t]he Alabama scheme of taxation . . . results in discrimination against Alabama railroads . . . in violation of Section 11501(b)(4), which entitles Norfolk [ ] to injunctive relief provided by Section 11501(c) thereof." The Defendants, Alabama Department of Revenue and Tim Russell, Commissioner of Revenue (collectively, "Department"), responded that Norfolk could not claim "reasonable cause" to believe that a 4-R Act violation had occurred, because the law has remained unchanged since *Burlington Northern Santa Fe Railway v. Monroe*, Civil Action No. 97-D-1754-N (M.D.Ala. Aug. 10, 1998) (holding that Alabama's sales and use tax on diesel fuel did not violate the 4-R Act).

Following the parties' submission of briefs and a hearing on March 14, the court[8] denied Norfolk's motion for preliminary injunction, concluding that Norfolk was unlikely to succeed on the merits of its claim. *See Norfolk S. Ry. v. Ala. Dep't of Revenue*, Civil Action No. 2:08-cv-00285-HGD, slip op. at 33 (N.D.Ala. Apr. 9, 2008). The court found that:

> the other taxes imposed on motor carriers and water carriers, such as excise taxes and motor fuel taxes should be considered [but] the use to which tax revenues are put should not be considered. This is because the State has [an] obligation to maintain public rights of way and must determine some way to fund that obligation, and the State cannot maintain the rails because they are private property.

*Id.* at 25. The court further held that "the sales and use tax paid by rail carriers is not discriminatory" because "[r]ail carriers do not pay a disproportionate amount of taxes in comparison to their direct competitors." *Id.* at 32. As "the overall tax scheme results in roughly equal treatment of all these carriers," Alabama "does not put rail carriers at an overall competitive disadvantage," considering that intrastate water carriers must pay the same sales and use tax and motor carriers must pay the various motor fuel excise taxes. *Id.*

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[8] The parties agreed pursuant to 28 U.S.C. § 636(c)(1) and FED.R.CIV.P. 73 to the exercise of jurisdiction by a federal magistrate judge.

Norfolk now brings this interlocutory appeal, in accordance with 28 U.S.C. § 1292(a)(1),[9] from the denial of its application for a preliminary injunction.

IV

The Court reviews trial court denials of preliminary injunctions under the abuse of discretion standard. *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1324 (11th Cir.2008) (per curiam). Accordingly, the Court reviews the trial court's findings of fact for clear error and its conclusions of law *de novo*. *Cumulus Media, Inc. v. Clear Channel Comme'ns, Inc.*, 304 F.3d 1167, 1171-72 (11th Cir.2002).

V

Our review, of course, must focus on Norfolk's specific claim that the *exemptions* for motor and water carriers from the Alabama fuel sales and use tax on diesel fuel are discriminatory in violation of the 4-R Act. Significantly, Norfolk does not complain that it must pay a different rate of tax on diesel fuel than other Alabama taxpayers. Instead, Norfolk argues that the district court erred by expanding its review to include consideration of Alabama's motor fuel excise and gasoline taxes, and that in determining whether a state tax discriminates against railroads, a court may look only to the challenged sales and use tax on diesel fuel itself and may not consider motor carriers' payment of the motor fuel excise and gasoline taxes.

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[9] 28 U.S.C. § 1292(a)(1) reads that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions."

Norfolk's legal analysis is, in part, correct, as explained below. Nonetheless, under the 4-R Act, as interpreted and applied by the Supreme Court, a state remains free to exempt certain transactions or entities from generally applicable taxes, such as the sales and use tax at issue here, as long as the state does not target railroads for discriminatory treatment. Thus, because we agree with the district court's ultimate conclusion that Norfolk cannot succeed on the merits of its underlying action, we affirm the district court's order denying Norfolk a preliminary injunction.[10]

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[10] Because we find a preliminary injunction unwarranted, as we affirm the district court's legal conclusion that Norfolk had no likelihood of success on the merits in this case, we need not address either (1) the power of the district court to award an injunction under 49 U.S.C. § 11501(c) where plaintiffs have not affirmatively proven, in accordance with that statute, that "the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction," or (2) the correct equitable standard for a district court to apply in awarding an injunction pursuant to subsection (c) in light of the U.S. Supreme Court's decisions in *Winter v. NRDC, Inc.*, ___ U.S. ___, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest . . . . A preliminary injunction is an extraordinary remedy never awarded as of right") and *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (in order to warrant injunctive relief, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction").

*A. ACF Industries applies to this case*

Although neither party briefed *ACF Industries* in depth, we find this 1994 U.S. Supreme Court decision regarding ad valorem tax exemptions determinative of Norfolk's appeal. In *ACF Industries*, the Supreme Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge under the [4-R Act, § 11501(b)(4)]." *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 335, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). The Court concluded that section 11501 "does not limit the States' discretion to exempt nonrailroad property, but not railroad property, from ad valorem property taxes of general application." *Id.* at 347-48, 114 S.Ct. 843.

The company in *ACF Industries* challenged Oregon's ad valorem tax on real and personal property on the ground that Oregon exempted various classes of goods from the tax, including motor vehicles, and instead charged such businesses a "modest annual registration fee." *Id.* at 335, 114 S.Ct. 843. Oregon thus "exempt[ed] certain classes of commercial and industrial property while taxing railroad cars in full." *Id.* at 337, 114 S.Ct. 843.

The Supreme Court analyzed the challenged tax under section (b)(4) for discrimination. *Id.* at 335, 114 S.Ct. 843. Because, under the 4-R Act's plain language, sections (b)(1)-(3) did not contemplate outlawing exemptions from generally applicable property taxes, the Court reasoned, (b)(4) could not either—"Congress placed exempt property beyond the reach of subsections (b)(1)-(3) [and therefore it would be] illogical to conclude that Congress . . . would turn

around and nullify its own choice in subsection (b)(4)." *Id.* at 343, 114 S.Ct. 843.[11]

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[11] In particular, the Supreme Court concluded:

> Subsections (b)(1)-(3) of § [11501] . . . forbid the imposition of higher property tax rates and assessment ratios upon "rail transportation property" than upon "other commercial and industrial property." "Commercial and industrial property," which serves as the comparison class for measuring unlawful discrimination under those provisions, is defined as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." § [11501](a)(4) . . . .
>
> The statute does not define [the phrase "subject to a property tax levy"], which on its face could bear one of two interpretations: (1) taxed property; or (2) taxable property, a broader category consisting of the general mass of property within the State's jurisdiction and power to tax, including property that enjoys a current exemption . . . .
>
> In the context of this provision, which concerns the differential assessment of taxed property, the words "property subject to a property tax levy" must mean "taxed property." Given the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning," that phrase must carry the same meaning in subsection (a)(4), where it qualifies the definition of "commercial and industrial property." . . .
>
> [Thus,] the definition of "commercial and industrial property" excludes property that is exempt. Exempt property, then, is not part of the comparison class against which discrimination is measured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions . . . .
>
> [W]e must pay heed to the fact that Congress placed exempt property beyond the reach of subsections

In *ACF Industries*, the Supreme Court primarily relied upon the plain language and structure of the 4-R Act, but "[o]ther considerations" buttressed its analysis. *Id.* at 343, 114 S.Ct. 843. First, the Court noted that the 4-R Act, while specifically addressing other types of discriminatory taxes, "does not speak with any degree of particularity to the question of tax exemptions." *Id.* Congress could clearly have prohibited such exemptions, but did not. *Id.* at 344, 114 S.Ct. 843. Second, the Court emphasized the traditional power of the states in providing exemptions from property taxes as "an important aspect of state and local tax policy." *Id.* Indeed, "[i]t was common at the time § [11501] was drafted, as it is now, for States with generally applicable ad valorem property taxes to exempt various classes of commercial property." *Id.* Congress's "silence on the subject . . . reflects a determination to permit the States to leave their exemptions in place." *Id.* Third, the Court determined that "principles of federalism" in fact compelled its reading of the 4-R Act, because "[w]hen determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, [the Court is] hesitant to extend the statute beyond its evident

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> (b)(1)-(3). It would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4). So [a contrary] reading of subsection (b)(4), while plausible when viewed in isolation, is untenable in light of § [11501] as a whole . . . . The structure of § [11501] . . . warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property.

*Id.* at 340-43, 126 S.Ct. 1837 (citations, internal quotation marks, and footnote omitted).

scope." *Id.* at 345, 114 S.Ct. 843. *See also Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 81 L.Ed. 1245 (1937) ("[i]t is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions.").

The Supreme Court did acknowledge, however, that a case in which "the railroads—either alone or as part of some isolated and targeted group—are the only commercial entities subject to an ad valorem property tax" could call into question whether the state had really "exempted" other commercial entities and could indicate a 4-R Act violation. *ACF Indus.*, 510 U.S. at 346-47, 114 S.Ct. 843. Nonetheless, as a result of *ACF Industries*, while the 4-R Act prohibits the imposition of discriminatory property tax rates, the Act does not prevent a state from exempting other commercial entities from such taxes and leaving taxes on railroads in place, so long as the railroad is not targeted.[12]

While in Norfolk's case we are dealing with exemptions to a sales and use tax, rather than an ad valorem tax as in *ACF Industries*, the Supreme Court's analysis is equally applicable. Therefore, *ACF Industries*' construction of the 4-R Act guides our decision. First, as with the ad valorem property taxes challenged in *ACF Industries*, there is nothing in the 4-R Act's plain language that indicates an intent to reach exemptions from generally applicable sales and use taxes. The language of section (b)(4) prohibits a discriminatory "tax" not a discriminatory tax exemption. Second, the Supreme Court did not limit its conclusion—that the

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[12] Although the conclusion seems "anomalous," within the context of the 4-R Act as a whole, the result is not "so bizarre that Congress 'could not have intended' it." *Id.* at 346-47, 126 S.Ct. 1837 (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 191, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991)).

4-R Act "does not speak with any degree of particularity to the question of tax exemptions"—to ad valorem property taxes; its conclusion therefore has direct application to the issue presented here. Third, as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted, and thus benefit from the same presumption that Congress' silence reflects a determination to leave such exemptions in place.[13]

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[13] In 1976 and before, most states exempted various entities and goods from sales taxes. *See* JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 50-82 (The Johns Hopkins University Press 1983) (describing historically common state sales tax exemptions, including exemptions for consumables, industrial fuel and machinery, agricultural goods, and food and other necessities, in addition to exemptions for charities and governmental entities); George B. Brabson, *Analysis of Sales and Use Tax Exemptions—With Comment as to More Uniform Applications*, 9 VAND. L. REVV. 294, 294, 308-15 (1956) (describing sales tax exemptions for governmental entities and interstate sales transactions, as well as exemptions "created out of governmental taxing policies or social economic considerations"; in particular, as of 1956, Alabama "granted nine broad areas of exemption [from its sales and use tax], including farm products, farming tools, implements and fertilizer, newsprint, textbooks, tobacco products, motor fuels, and food-stuffs"). *See also* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM: 1976-77 EDITION, VOL. II REVENUE AND DEBT 185 (1976), *available at* http://www.library.unt.edu/gpo/acir/SFFF/SFFF-1976-1977-V2.pdf (showing that 37 states exempted medicines and 22 exempted food from sales tax); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LEGISLATIVE PROGRAM, VOL. 3 STATE AND LOCAL REVENUES 104 (1975), *available at* http://www.library.unt.edu/gpo/acir/Reports/information/m-94.pdf (stating that "many states" provided sales tax exemptions for "food, drug, and other commodities"); Carroll H. Sierk, *State Tax*

Finally, concerns for state sovereignty are just as keen. We accordingly join other courts that also have applied the *ACF Industries'* analysis to state and local taxes analogous to Alabama's sales and use tax on diesel fuel.[14]

We recognize that some courts post-1994 appear to have ignored *ACF Industries*, and have instead scrutinized exceptions to generally applicable *non*-property taxes.[15] However, as these decisions do not even discuss *ACF Industries* or its influence on their analyses, we do not find them persuasive. In addition, these cases conflict with pre-1994 cases that have applied a similar analysis to that in *ACF Industries* to non- property taxes. *See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1187-88 (7th

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*Exemptions of Non-Profit Organizations*, 19 CLEV. ST. L. REV. 281, 282 (1970).

[14] *See, e.g., Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 442-44 (9th Cir.1996), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996) (exemptions for transaction privileges and use taxes); *Reg'l Disposal Co. v. City of Centralia*, 147 Wash.2d 69, 51 P.3d 81, 83 (2002) (tax on solid waste transfer); *Dep't of Revenue v. Durango & Silverton Narrow Gauge R.R.*, 989 P.2d 208, 215-16 (Colo.App.1999) (tourism taxes); *Burlington N. Santa Fe Ry. v. Monroe*, Civil Action No. 97-D-1754-N, slip op. at 21-24 (M.D.Ala. Aug. 10, 1998). *See also Burlington N. & Santa Fe Ry. v. Atwood*, 271 F.Supp.2d 1359, 1367 (D.Wyo.2003) (coal transportation tax).

[15] *See, e.g., CSX Transp., Inc. v. Ala. Dep't of Revenue*, Civil Action No. 2:08-cv-00655-UWC, slip op. at 7 (N.D.Ala. July 8, 2008); *Union Pac. R.R. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695-96 (8th Cir.2007); *Ka. City S. Ry. v. Bridges*, No. 04-2547, 2007 U.S. Dist. LEXIS 23477, at *16-25 (W.D.La. Mar. 30, 2007); *Burlington N. R.R. v. Comm'r of Revenue*, 606 N.W.2d 54, 58-59 (Minn.2000); *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984, 985-86 (8th Cir.1999), *cert. denied*, 529 U.S. 1098, 120 S.Ct. 1832, 146 L.Ed.2d 776 (2000).

Cir.1991); *Ka. City S. Ry. v. McNamara*, 817 F.2d 368, 374-78 (5th Cir.1987).

Therefore, we hold that *ACF Industries* controls our analysis, and dictates that the Alabama tax statute at issue, with its exemptions for motor and water carriers, does not offend the 4-R Act so long as the tax is generally applicable and does not target railroads within Alabama.

*B. Alabama's sales and use tax on fuel is generally applicable and does not target railroads*

The sales and use tax at issue in this case qualifies as generally applicable, and thus does not discriminate against railroads in violation of the 4-R Act. Alabama levies its four percent sales tax "[u]pon every person, firm, or corporation . . . engaged . . . in the business of selling at retail any tangible personal property whatsoever," ALA.CODE § 40-23-2(1), and its four percent use tax "on the storage, use or other consumption in this state of tangible personal property." *Id.* § 40-23-61(a).

Simply because Alabama exempts interstate water carriers as well as some motor carriers does not transform the assessment into a discriminatory tax. Although a tax with widespread exemptions could indicate that a state has "single[d] out" the railroad for discriminatory treatment, that is not the case here. *ACF Indus.*, 510 U.S. at 347, 114 S.Ct. 843. Alabama exempts from the sales and use tax various types of goods and entities. *See* ALA.CODE §§ 40-23-4 to -5, -62. Specifically, the Alabama tax code exempts sales and use tax on diesel fuel as to motor carriers; interstate shippers; state, county, and municipal entities; county and city school boards; certain charitable organizations; commercial fishing vessels; fuel for kiln use in

manufacturing plants; fuel for off-highway agricultural uses; fuel for off-shore resource exploration; and fuel temporarily brought into Alabama by a non-resident for personal use. *See id.* However, all other entities are subject to the tax on diesel fuel, including intrastate water carriers and motor carriers that have not paid the motor fuel excise tax. On the record before the court, Alabama's sales and use tax does not target or single out railroads.

Our conclusion is consistent with previous case law in other jurisdictions. Generally, cases that have applied *ACF Industries* or similar analyses, and have found taxes to target the railway industry, have involved taxes levied almost exclusively upon railroads.[16] In contrast, taxes more like the tax at

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[16] *See, e.g., Burlington N. & Santa Fe Ry. v. Atwood*, 271 F.Supp.2d 1359, 1363, 1367 (D.Wyo.2003) (holding that Wyoming's Coal Transportation Tax, although generally applicable, singled out railroads because they were liable for more than 99% of the total tax); *Reg'l Disposal Co. v. City of Centralia*, 147 Wash.2d 69, 51 P.3d 81, 83 (2002) (holding the tax on solid waste transfer targeted railroads, as it taxed an activity only engaged in by railroads); *Dep't of Revenue v. Durango & Silverton Narrow Gauge R.R.*, 989 P.2d 208, 215-16 (Colo.App.1999) (holding the tourism taxes discriminatory because they taxed only a very small group of taxpayers, of which railroads were a part); *Burlington N. R.R. v. Huddleston*, 94 F.3d 1413, 1417 (10th Cir.1996) (finding a 4-R Act violation when state law exempted all entities except a very "narrow group" of taxpayers, including railroads, from tax on personal property); *Burlington N. R.R. v. Bair*, 60 F.3d 410, 413 (8th Cir.1995), *cert. denied*, 516 U.S. 1113, 116 S.Ct. 914, 133 L.Ed.2d 844 (1996) (finding discrimination when a state tax singled out for taxation all personal property of railroads while leaving untaxed most personal property of other taxpayers); *Ogilvie v. State Bd. of Equalization*, 893 F.Supp. 882, 886 (D.N.D.1995) (holding that state targeted railroads "under the pretext of broad exemptions"—only four industries, including railroads, paid the tax); *Burlington N. R.R. v.*

issue in this case, where a state taxes railroads along with many other businesses, but exempts certain discrete industries, have been found to be generally applicable and thus not discriminatory.[17]

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*City of Superior*, 932 F.2d 1185, 1187-88 (7th Cir.1991) (holding that the occupational tax on iron ore concentrates docks, though generally applicable, in effect applied only to docks owned by one particular rail carrier and thus illegally targeted it); *Ka. City S. Ry. v. McNamara*, 817 F.2d 368, 370, 374-78 (5th Cir.1987) (holding that the class of taxpayers, only transportation and communication utilities, was unnecessarily small to be generally applicable); *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir.1985) (finding 4-R Act discrimination when a roll back and credit scheme had the effect of exempting 95% of personal property owners from taxation).

[17] *See, e.g., ACF Indus.*, 510 U.S. at 346-48, 114 S.Ct. 843 (finding no discrimination when a generally applicable property tax exempted many other industries); *Burlington N. & Santa Fe Ry. v. State Tax Comm'n*, 188 F.3d 1039, 1042 (8th Cir.1999) (comparing "general application" category to "exempt" category, and finding that a personal property tax as applied to rolling stock that exempts property in transit through the state did not violate the 4-R Act); *Burlington N. Santa Fe Ry. v. Monroe*, Civil Action No. 97-D 1754-N, slip op. at 21-22 (M.D.Ala. Aug. 10, 1998); *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 442-44 (9th Cir.1996), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996) (holding that exemptions for motor carriers from the transaction privileges and use taxes did not violate the 4-R Act—the tax was imposed upon 17 classifications of business activities and encompassed over 140,000 taxpayers); *Duluth, Missabe & Iron Range Ry. v. Wisconsin*, 100 F.3d 69, 71 n. 2 (7th Cir.1996) (holding that generally applicable ad valorem taxes analogous to *ACF Industries* not discriminatory); *Union Carbide Corp. v. Bd. of Tax Comm'rs*, 69 F.3d 1356, 1359 (7th Cir.1995) (same); *Burlington N. R.R. v. Wisc. Dep't of Revenue*, 59 F.3d 55, 57-58 (7th Cir.1995) (holding that even a tax that exempted 80% of non-railroad commercial and industrial property from generally applicable ad valorem property tax did not violate the 4-R Act); *CSX Transp., Inc. v. Tenn. State Bd. of*

Although we conclude that Alabama's sales and use tax on fuel is generally applicable and does not target railroads, Norfolk raises one additional argument that we must address. Norfolk attempts to claim that the Alabama tax structure singles out railroads, because Alabama uses the proceeds of the taxes levied on motor carriers to maintain roads and railroads do not receive similar subsidies in violation of *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). In *West Lynn*, the Supreme Court held that the discriminatory effects of a tax or other payment to the state cannot be analyzed without taking into account "the use to which payments are put." *Id.* at 201, 114 S.Ct. 2205. *West Lynn*, however, involved a direct subsidy to in-state producers, rather than an alleged indirect subsidy such as that at issue here. *Id.* at 191, 114 S.Ct. 2205. Furthermore, the Supreme Court disapproved of the subsidy because it constituted an unlawful burden *against interstate commerce*. *Id.* at 199, 114 S.Ct. 2205 ("A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce." (footnote omitted)). Although Congress grounded its implementation of the 4-R Act in U.S. CONST. art. I, § 8, CL. 3, *see Pittsburgh & Lake Erie R.R. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510-11, 109 S.Ct. 2584, 105 L.Ed.2d 415 (1989), our analysis in this case is

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*Equalization*, 801 F.Supp. 28, 35 (M.D.Tenn.1992) (holding that generally applicable ad valorem taxes analogous to *ACF Industries* not discriminatory).

limited to the specific statutory language of the 4-R Act, rather than the scope of the Commerce Clause. *See Ka. City S. Ry. v. McNamara*, 817 F.2d 368, 376 (5th Cir.1987) ("Although it may be helpful in analyzing some aspects of the problem, Commerce Clause doctrine does not answer the questions posed by the 4-R Act.").

It follows that we find Norfolk's arguments unpersuasive. We will not compare the sales and use tax to the fuel excise tax, insofar as there are differences in the ways in which their respective proceeds are spent. First, in line with the majority of other jurisdictions, and as Norfolk itself urges, we decline to look past the particular tax at issue to analyze the overall state tax structure.[18] Second, we believe that

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[18] *See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1187-88 (7th Cir.1991); *Gen. Am. Transp. Corp. v. Limbach*, No. C-2-85-1603, 1987 WL 288146, at *9, 1987 U.S. Dist. LEXIS 13362, at *33-34 (S.D.Ohio Dec.28, 1987); *Gen. Am. Transp. Corp. v. Kentucky*, 791 F.2d 38, 41-42 (6th Cir.1986); *McNamara*, 817 F.2d at 376-78; *Ala. Great S. R.R. v. Eagerton*, 541 F.Supp. 1084, 1086 (M.D.Ala.1982). Earlier cases applied the analysis that Norfolk advocates. *See Burlington N. R.R. v. Triplett*, 682 F.Supp. 443, 445-46 (D.Minn.1988) (holding that railroads had a competitive disadvantage: "the fuel tax paid by trucks is dedicated to the trucks' roadbeds [whereas] the railroads must pay the fuel tax in addition to paying for their tracks", and barges and airplanes, which pay the same tax rate as railroads, "do not have to maintain their right-of-ways"); *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984). However, the Eighth Circuit has overruled *Triplett* in *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1303 (8th Cir.1991), *cert. denied*, 502 U.S. 856, 112 S.Ct. 169, 116 L.Ed.2d 133 (1991). In *Trailer Train*, the court definitively held that "the use of the proceeds of a tax has no bearing on the question of whether the tax is discriminatory" under the 4-R Act. *Trailer Train*, 929 F.2d at 1303. Other courts have fol-

the use to which a state puts its tax revenue is irrelevant to the issue of 4-R Act discrimination. *See Atchison, Topeka & Santa Fe Ry.*, 78 F.3d at 443; *Trailer Train v. State Tax Comm'n*, 929 F.2d at 1303. The 4-R Act itself "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976). Alabama must pay for the creation, maintenance, and repair of its roads, and must, in some fashion, obtain funds for such creation, maintenance, and repair. But Alabama has no constitutional discretion to allocate funds to private property. *See* ALA. CONST. art. IV, § 93 ("The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such . . . ; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation."). Furthermore, Alabama maintains the roads for the public good and not for the benefit of motor carriers; motor carriers only tangentially benefit from the public roads. The ownership and maintenance of its rights-of-way, with both the costs and benefits associated with such ownership, merely constitute part of Norfolk's cost of doing business as a railroad, and do not indicate discrimination as to Norfolk or other railway companies.

Accordingly, we conclude that Norfolk would not succeed on the merits of its case. Consequently, we also

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lowed suit. *See, e.g., Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 443 (9th Cir.1996), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996) ("The 4-R Act reaches only tax burdens and not tax benefits"); *Burlington N. R.R. v. Comm'r of Revenue*, 606 N.W.2d 54, 60 (Minn.2000).

conclude that the district court did not abuse its discretion in denying the preliminary injunction, and the district court's denial of the preliminary injunction is

AFFIRMED.

**APPENDIX F**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed AUG. 20, 2009]

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No. 09-10772-FF

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CSX TRANSPORTATION, INC.,
*Plaintiff-Appellant,*

versus

ALABAMA DEPARTMENT OF REVENUE,
TIM RUSSELL, Commissioner of the
Alabama Department of Revenue,
*Defendants-Appellees.*

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On Petition for Hearing En Banc from the
United States District Court for the
Northern District of Alabama

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BEFORE: BLACK, BARKETT and HILL, *Circuit Judges*

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JAMES C. HILL
UNITED STATES CIRCUIT JUDGE

# OPPOSITION BRIEF

No. 09-520

MAR 19 2010

# In The
# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE and TIM RUSSELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Alabama's generally applicable sales and use tax on diesel fuel, imposed on railroads, discriminates against railroads in violation of Section 301(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4), when the State's overall excise tax structure imposes other, differently labeled, excise taxes on the railroad's direct competitors on the same taxable event.

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## STATEMENT OF THE CASE

### A. STATUTORY BACKGROUND

Congress' purpose in adopting the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act") was not to grant railroads preferential treatment, but to "remedy discrimination against the railroads and place them on an equal playing field with other state taxpayers." *See Atchison, Topeka, and Santa Fe Ry. v. State of Ariz.*, 78 F.3d 438, 442 (9th Cir. 1996) (*ASTF*) (*citing Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1991)). Therefore, a tax will only be discriminatory under (b)(4) of the 4-R Act "if it imposes a proportionately heavier tax on railroading than on other activities." *ASTF* at 441 (*quoting Burlington N.R.R. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991)). In fact, railroads have received preferential treatment by paying less tax per gallon of diesel fuel than their direct competitors.

The sale or consumption of petroleum products in Alabama is generally subject either to the various excise taxes imposed by Title 40, Chapter 17 of the Alabama Code ("motor fuels tax"), or to sales and use taxes imposed by Title 40, Chapter 23 of the Alabama Code ("sales and use tax"). Fuel subject to the motor fuels tax under Title 40, Chapter 17 is not subject to sales and use tax under Title 40, Chapter 23. Because the purchase and consumption of diesel fuel by railroads is not subject to motor fuels tax, railroads are subject to sales and use tax.

Alabama law provides a few narrow, specific exemptions to both motor fuel taxes and sales and use taxes. *See* Title 40, Chapter 17 and Title 40, Chapter 23 of the Ala. Code. However, it is important to note that simply because a taxpayer may receive an exemption from one excise tax does not mean that they are not taxed under a differently labeled excise tax on the exact same underlying transaction.

CSXT, for example, is exempt from the additional Article 6 excise tax on gasoline. Ala. Code § 40-17-220(c)(2). In other words, railroads pay gasoline tax at the rate of 12 cents per gallon, while motor carriers and the majority of other taxpayers pay gasoline tax at the rate of 16 cents per gallon. Ala. Code §§ 40-17-31(a) and 40-17-220. In addition, railroads are not subject to the 19 cents per gallon motor fuel tax on their purchases of diesel fuel. *See* Ala. Code §§ 40-17-2(1) (13 cents per gallon) and 40-17-220(e) (6 cents per gallon) paid by on-road motor vehicles ("motor carriers"), the principal competitors of railroads. Because railroads do not pay the motor fuels tax on their purchases of diesel fuel, these purchases are taxed at the lower 4% general rate of sales and use tax. *See* Ala. Code § 40-23-2(1).

## B. PROCEEDINGS BELOW

In the factually indistinguishable case of *Norfolk Southern Ry. v. Alabama Dept. of Revenue*, 550 F.3d 1306 (11th Cir. 2008), the Eleventh Circuit, in a unanimous decision, held that Alabama's generally

applicable sales and use tax on diesel fuel did not discriminate against railroads in violation of section 301(d) of the 4-R Act, 49 U.S.C. § 11501(b)(4). In rendering its decision, the Eleventh Circuit found this Court's analysis in *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332 (1994) to be determinative of Norfolk Southern's appeal. *Norfolk Southern* at 1313.

Accordingly, immediately following the issuance of the *Norfolk Southern* opinion by the Eleventh Circuit, the district court in the instant case *sua sponte* entered an order on December 16, 2006, dissolving the preliminary injunction previously entered and dismissing CSX Transportation Inc.'s ("CSXT") case, citing *Norfolk Southern* as dispositive. Pet. App. 3a. CSXT appealed and sought an en banc hearing by the Eleventh Circuit, which was denied. Pet. App. 39a. Shortly after this denial the Eleventh Circuit affirmed the district court's dismissal of CSXT's case. Pet. App. 2a.

## REASONS FOR DENYING THE PETITION

### I. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT ALABAMA'S GENERALLY APPLICABLE SALES AND USE TAX DOES NOT DISCRIMINATE AGAINST RAILROADS IN VIOLATION OF THE 4-R ACT.

Not only is the Eleventh Circuit's unanimous decision in *Norfolk Southern* correctly decided and directly on point, the Eleventh Circuit applied this

Court's analysis in the case of *Dep't of Revenue v. ACF Indus. Inc.*, 510 U.S. 332 (1994). Conversely, the Eighth Circuit decisions cited by the Petitioner are distinguishable as the Eighth Circuit did not apply the *ACF Industries* analysis. Instead, it is the decisions of the Eighth Circuit that are in conflict with this Court's analysis, while the decision of the Eleventh Circuit is in accord with this Court's precedent.

In *Norfolk Southern*, the Eleventh Circuit held that Alabama's generally applicable sales and use tax on diesel fuel did not discriminate against railroads in violation of the 4-R Act. *Id.* at 1316. In reaching this holding, the Eleventh Circuit found this Court's decision in *ACF Industries* to be determinative of Norfolk Southern's appeal. *Norfolk Southern* at 1313.

In *ACF Industries*, this Court considered a challenge to Oregon's ad valorem tax on real and personal property on the ground that Oregon exempted various classes of commercial and industrial property while taxing railroad cars in full. *Id.* at 337. In rendering its decision, this Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge under the [4-R Act, § 11501(b)(4)]." *Id.* at 335. This Court further concluded that § 11501 "does not limit the States' discretion to exempt nonrailroad property, but not railroad property from ad valorem property taxes of general application." *Id.* at 347-48.

While the Eleventh Circuit acknowledged that Norfolk Southern's case dealt with exemptions to a sales and use tax, instead of an ad valorem tax as that considered in *ACF Industries*, it nevertheless found the Supreme Court's analysis to be "equally applicable," as the Eleventh Circuit could find nothing in the 4-R Act to indicate an "intent to reach exemptions for generally applicable sales and use taxes," and importantly, that this Court did not limit its conclusion in *ACF Industries* to ad valorem property taxes. *Norfolk Southern* at 1314-15. Finally, as with property tax exemptions, sales and use tax exemptions were in existence when the 4-R Act was drafted and Congress' silence on exemptions must reflect "a determination to leave such exemptions in place." *Norfolk Southern* at 1315. Therefore, the Eleventh Circuit correctly held that *ACF Industries* controlled its analysis. *Id.* at 1316.

## II. THE ELEVENTH CIRCUIT DISTINGUISHED ITS HOLDING AND FOUND ITS CONCLUSION CONSISTENT WITH PREVIOUS CASE LAW IN OTHER JURISDICTIONS.

Rather than acknowledge a conflict, the Eleventh Circuit instead joined "other courts that have applied the *ACF Industries*' analysis to state and local taxes analogous to Alabama's sales and use tax on diesel fuel." *Norfolk Southern* at 1315. While the Eleventh Circuit recognized that "some post-1994 courts ignored *ACF Industries*" and "instead scrutinized

exceptions to generally applicable *non*-property taxes," the Eleventh Circuit correctly pointed out that such decisions did "not even discuss *ACF Industries* or its influence on their analyses" and thus the Eleventh Circuit found such cases "unpersuasive." *Norfolk Southern* at 1315 & n. 15. Not unimportantly, the Eleventh Circuit also found that "these cases conflict with pre-1994 cases that have applied a similar analysis to that in *ACF Industries* to non-property taxes. *See, e.g., Burlington N.R.R. v. City of Superior*, 932 F.2d 1185, 1187-88 (7th Cir. 1991); *Ka. City S. Ry. v. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987)." *Northern Southern* at 1315-16. Therefore, the Eleventh Circuit held that Alabama's generally applicable sales and use tax on diesel fuel does not target railroads within Alabama, and thus does not discriminate against railroads in violation of the 4-R Act. *Id.* at 1316.

Furthermore, in rendering its decision, the Eleventh Circuit stated "[o]ur conclusion is consistent with previous case law in other jurisdictions," and concluded, "[g]enerally cases that have applied *ACF Industries* or a similar analysis, and have found taxes to target the railway industry, have involved taxes levied almost exclusively upon railroads." *Norfolk Southern* at 1316. In contrast, the Eleventh Circuit reasoned that taxes like those at issue in this case, "where a state taxes railroads along with many other businesses, but exempts certain discrete industries, have been found to be generally applicable and thus not discriminatory." *Id.* at 1316-17. Therefore, the

Eleventh Circuit concluded that Alabama's generally applicable sales and use tax on diesel fuel does not target railroads and thus does not discriminate in violation of the 4-R Act. *Id.*

The Ninth Circuit, in the case of *Atchison, Topeka, and Santa Fe Ry. v. State of Ariz.*, 78 F.3d 438 (9th Cir. 1996), also found this Court's logic advanced in *ACF Industries* to be "equally applicable to the context of transaction privilege tax and use tax exemptions." *ASTF* at 443. Therefore, the privilege tax and use tax exemptions at issue for motor carriers did "not violate the 4-R Act because the taxes at issue are generally applicable and railroads are treated fairly in comparison to other taxpayers subject to the Arizona taxes." *Id.* at 444.

Contrary to the holdings of the Eleventh and Ninth Circuits, the Eighth Circuit inexplicably ignored this Court's analysis in *ACF Industries*. *See Burlington Northern Santa Fe Ry. Co. v. Lohman*, 198 F.3d 984 (8th Cir. 1999); *Union Pacific R.R. Co. v. Minnesota Dept. of Revenue*, 507 F.3d 693 (8th Cir. 2007). Without this Court's analysis of *ACF Industries*, it is not surprising that the Eight Circuit reached a different conclusion than that of the Eleventh and Ninth Circuits by holding that Missouri and Minnesota's sales and uses taxes on fuel purchased by railroads violated the 4-R Act. *See Lohman*; *Union Pacific*. Importantly, the Eleventh Circuit was correct in holding as "these decisions do not even discuss *ACF Industries* or its influence on their

analyses," the Eighth Circuit decisions were not persuasive. *Norfolk Southern* at 1315 & n. 15.

## III. ALABAMA'S SALES AND USE TAX ON DIESEL FUEL DOES NOT DISCRIMINATE AGAINST RAILROADS AS THE STATE'S EXCISE TAX STRUCTURE IMPOSES DIFFERENTLY LABELED EXCISE TAXES ON THEIR DIRECT COMPETITORS ON THE SAME TAXABLE EVENT.

In a comprehensive, well-researched decision, the Eleventh Circuit correctly decided the factually indistinguishable case of *Norfolk Southern*. However, had the Eleventh Circuit not applied this Court's reasoning in *ACF Industries*, there are other grounds, not relied upon by the Eleventh Circuit, that demonstrate that its decision is correct. The excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) as compared to both the railroads and their direct competitors must be analyzed. It is well-settled law that the United States Supreme Court will give great weight to the characterization of a tax, or interpretation of state law emanating from the highest court of a state, but where a federal question is involved, the Supreme Court is not bound by the label attached to the tax or character ascribed by law, but must determine for itself the true nature of the tax by ascertaining its operation and effect. *See, e.g., Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 296 U.S. 113 (1935); *see also Lawrence v. State Tax Commission*, 286 U.S.

276, 280 (1932) (Court concerned only with a tax's practical operation, not its precise definition of descriptive words); *also Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) (when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the Court must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.). An evaluation of the operation and effect of the relevant excise taxes, regardless of their descriptive labels, paid on the purchase and consumption of diesel fuel by the railroads and their direct competitors can logically and easily be reviewed by looking only at the applicable excise tax each party is subject to per gallon of diesel fuel.

There is nothing in the 4-R Act that requires a court evaluating whether a state tax results in tax discrimination against a railroad to ignore a tax structure that imposes a tax on the same taxable event (the use and/or consumption of a gallon of diesel fuel) but merely labels the tax differently. Instead, the 4-R Act requires a determination of whether the attendant tax on purchases of diesel fuel, regardless of its label, results in tax discrimination. Railroads, despite being part of the general class of taxpayers subject to a sales tax on their diesel fuel purchases,[1]

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[1] All taxpayers of the State of Alabama, who do not pay the motor fuel tax, and are not exempt from the sales and use tax by

(Continued on following page)

suffer no tax discrimination when compared to their direct competitors, who themselves pay a differently labeled, and higher, excise tax (motor fuels excise tax) on their purchases of diesel fuel, 19 cents per gallon for diesel fuel (motor fuel excise tax), regardless of the price paid per gallon.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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statute, pay the 4% general rate of sales and use tax on purchases of diesel fuel. Ala. Code § 40-23-2(1).

# REPLY BRIEF

No. 09-520

SUPREME COURT, U.S.
JAN 25 2010
OFFICE OF THE CLERK

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CSX TRANSPORTATION, INC.,
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TIM RUSSELL, COMMISSIONER OF THE ALABAMA
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*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY IN SUPPORT OF PETITION

Alabama concedes a circuit split on the question presented, acknowledging that two decisions of the Eighth Circuit conflict with decisions of the Ninth and Eleventh Circuits on whether a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge under § 11501(b)(4) of the 4-R Act. See BIO 4, 7-8. And Alabama does not deny that the Supreme Courts of Minnesota and Iowa are in accord with the Eighth Circuit. See Pet. 9. This mature and intractable conflict plainly warrants this Court's review.

Alabama asserts that the Eighth Circuit's decisions are unpersuasive because they fail to account for *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), which held that property tax exemptions are not subject to challenge under § 11501(b)(4). See BIO 4-8. Alabama is wrong on the merits, as the petition demonstrates. See Pet. 10-13. More to the point, Alabama's view of the merits does not undermine, and indeed confirms, the existence of a decisional conflict worthy of this Court's review. See BIO 4 ("it is the decisions of the Eighth Circuit that are in conflict with this Court's analysis, while the decision of the Eleventh Circuit is in accord with this Court's precedent"). This is not the time or place to debate the merits; Alabama can do that when it briefs the issue after certiorari is granted.

Alabama also maintains that the Eleventh Circuit did not "acknowledge a conflict" on the question presented. BIO 5. The conflict exists, of course, regardless of whether it is acknowledged. See Pet. 8-10. As it happens, the Eleventh Circuit recognized that its view of the scope of § 11501(b)(4) conflicts

with the view adopted by the Eighth Circuit and Minnesota Supreme Court. See App. 31a ("We recognize that some courts post-1994 ... have ... scrutinized exceptions to generally applicable *non*-property taxes."); *id.* at 31a n.15 (citing *Union Pac. R.R.* v. *Minn. Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007); *Burlington N. R.R.* v. *Comm'r of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999)).

Finally, Alabama contends that the Eleventh Circuit's judgment should be affirmed on "grounds[] not relied upon by the Eleventh Circuit"—*i.e.*, that the tax does not, in fact, discriminate against railroads. BIO 8. Alabama argues that its tax does not violate the 4-R Act because, while railroads must pay sales and use tax on diesel fuel even though their competitors are exempt, certain competitors are subject to a motor fuels excise tax that railroads do not pay. See *id.* at 9-10.

Again, Alabama is wrong on the merits. Even the Eleventh Circuit held that a court evaluating a tax imposed on railroads under the 4-R Act may not consider whether railroad competitors are subject to a different tax. App. 36a ("we decline to look past the particular tax at issue to analyze the overall state tax structure"); *accord, e.g.*, *Union Pac. R.R.*, 507 F.3d at 696 ("only those taxes imposed upon the Railroads are taken into account in determining whether those taxes are discriminatory"). In any event, Alabama's argument is beyond the scope of the petition. The Question Presented asks only whether exempting railroad competitors from a generally applicable sales and use tax "is subject to challenge" under § 11501(b)(4)—not whether the exemption would survive if actually scrutinized under the provision. Pet. i. If the Court grants review and holds that

CSXT's challenge may be entertained under § 11501(b)(4), Alabama may present on remand all of its arguments as to why its tax is not discriminatory.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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# REPLY BRIEF

No. 09-620

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## ARGUMENT

The Acting Solicitor General agrees with CSXT that the Eleventh Circuit erred in holding that the imposition on railroads of a generally applicable non-property tax, and exemption of railroad competitors from the same tax, is immune from scrutiny under 49 U.S.C. § 11501(b)(4). U.S. Br. 11-15. The Acting Solicitor General further agrees that this threshold issue "has continued to arise" in 4-R Act litigation, and that the conflict among the federal circuits and state courts of last resort on the issue is "entrenched" and "worthy of this Court's review." *Id.* at 16. And like CSXT, the Acting Solicitor General urges that certiorari be confined to the threshold question whether CSXT's challenge to the Alabama tax is cognizable under subsection (b)(4) and not encompass whether the tax actually violates that provision. *Id.* at 17-20. For these reasons, the petition plainly should be granted.

The Acting Solicitor General recommends that CSXT's formulation of the question presented be slightly modified to make clear that "the relief in a successful Section 11504(b)(4) challenge is not to" revoke a tax exemption granted to non-railroads, but to enjoin imposing the tax on railroads. *Id.* at 19. The Acting Solicitor General's concern goes to the proper remedy under the 4-R Act, an issue that will not arise if the Court's review is limited to the question presented—whether CSXT's challenge is cognizable under subsection (b)(4). That said, CSXT does not object to the proposed reformulation of the question presented.

Only one other matter warrants mention. While noting that the Court has not been asked to address, and in fact should not address, the "ultimate validity"

of the challenged tax, the Acting Solicitor General states that a court resolving a subsection (b)(4) challenge "should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers." *Id.* at 17. Of the five circuits to have expressly considered this issue, all have taken the opposite view and "decline[d] to look past the particular tax at issue to analyze the overall state tax structure." *Norfolk S. Ry. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1318 (11th Cir. 2008) (reproduced at Pet. App. 36a); *accord Union Pac. R.R. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) ("we 'look only at the sales and use tax with respect to fuel to see if discrimination has occurred'") (quoting *Burlington N., Santa Fe Ry. v. Lohman*, 194 F.3d 984, 986 (8th Cir. 1999)); *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1187-88 (7th Cir. 1991) (same); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302-03 (8th Cir. 1991) (same); *Kan. City S. Ry. v. McNamara*, 817 F.2d 368, 377-78 (5th Cir. 1987) (same); *Gen. Am. Transp. Corp. v. Comm. of Ky.*, 791 F.2d 38, 41-42 (6th Cir. 1986) (same).

There are sound reasons supporting the circuits' unanimous view that 4-R Act tax discrimination cases should focus solely on the particular tax at issue and forgo examination of a State's overall tax structure. One oft-cited reason is workability. As the Seventh Circuit explained, it is "unrealistic to think a court could figure out whether different taxes on other activities might offset the burden on the railroad industry of a tax limited to railroads." *Burlington N. R.R.*, 932 F.2d at 1187-88; *accord, Kan. City S. Ry.*, 817 F.2d at 377 ("Determining the intrinsic economic fairness of a [State's overall] tax system to a particular taxpayer is a paradigm of the

kind of polycentric problem for which courts are ill-suited"). The Fifth Circuit pointed to another problem, cautioning that "[a]side from the theoretical difficulty of assessing the basic fairness of a state tax system, an attempt to make the assessment would be extraordinarily costly to both the parties and the judicial system." *Ibid.*, *accord*, *Burlington N., Santa Fe Ry.*, 193 F.3d at 986 (the fairness of "a state's overall tax structure * * * is too difficult and expensive to evaluate") (internal quotation marks omitted). Moreover, "because the dynamic nature of any state's economy will alter the relative benefits and burdens of its tax system from moment to moment," *Kan. City S. Ry.*, 817 F.2d at 377, evaluating the overall fairness of a state tax system, even assuming the endeavor were feasible, could result in a challenged tax violating the 4-R Act in some years and complying in others. Finally, as a textual matter, "[t]here is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state." *Ibid.*; *cf. Ariz. Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 149-50 (1979) ("To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it.") (interpreting provision of Tax Reform Act of 1976 prohibiting state tax schemes that discriminate against out-of-state producers, sellers, or users of electricity).

The Acting Solicitor General's limited discussion of this issue (U.S. Br. 17 & n.8) does not consider case law from outside the Eighth Circuit, and does not address any of the several grounds articulated by the circuits over the years for focusing solely on the

particular tax at issue. In all events, CSXT agrees with the Acting Solicitor General that this issue need not be resolved at this juncture, and that certiorari should be limited to the threshold question whether CSXT's challenge to the Alabama tax is cognizable under subsection (b)(4).

## CONCLUSION

For the foregoing reasons and those stated in the petition, the reply brief, and the *amicus curiae* brief, certiorari should be granted.

Respectfully submitted.

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# AMICUS CURIAE BRIEF

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No. 09-520

# In the Supreme Court of the United States

CSX TRANSPORTATION INC., PETITIONER

*v.*

ALABAMA DEPARTMENT OF REVENUE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier."

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# In the Supreme Court of the United States

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CSX TRANSPORTATION INC., PETITIONER

*v.*

ALABAMA DEPARTMENT OF REVENUE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the following question:

> Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier."

### STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (4-R Act), to "provide the means to rehabilitate and maintain the physical facilities, improve the

operations and structure, and restore the financial stability of the railway system of the United States." *Id.* § 101(a), 90 Stat. 33; see *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

a. The Act targets discriminatory state taxation as a particular cause of decline in the rail industry. See 4-R Act § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007).[1] After long study, Congress found that certain forms of state taxation of rail carriers "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). To protect those important channels of interstate commerce, Congress created an exception to the Tax Injunction Act, 28 U.S.C. 1341, empowering federal courts to enjoin prohibited forms of state taxation. 49 U.S.C. 11501(c).

Section 11501(b) describes several types of prohibited taxation. Subsections (b)(1)-(3) address ad valorem property taxes; those provisions bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property rela-

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[1] Section 306 of the 4-R Act, 90 Stat. 54, has been repeatedly recodified and rephrased without substantive change. It was originally codified at 49 U.S.C. 26c (1976). It was then recodified in 1978, with a slight change in language, at 49 U.S.C. 11503 (1994) as part of the enactment into positive law of Title 49. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. That restatement of prior law was "without substantive change." *Id.* § 3(a), 92 Stat. 1466; see *Burlington N. R.R.*, 481 U.S. at 457 n.1. In 1995, the provisions of Section 11503 were again reenacted without substantive change but renumbered as Section 11501, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission and created the Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. Accordingly, this brief refers throughout to the current codification of Section 306 at 49 U.S.C. 11501. See Sup. Ct. R. 34.5.

tive to "other commercial and industrial property." Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. See *CSX Transp.*, 552 U.S. at 16, 18 (referring to "objective benchmark[s]" underlying "the comparison of ratios the statute requires" in Subsections (b)(1)-(3)); *Burlington N. R.R.*, 481 U.S. at 461 (rejecting as "untenable" the view that a claim under Subsection (b)(1) requires proof of intentional discrimination).

A separate catch-all provision, 49 U.S.C. 11501(b)(4), broadly prohibits States from imposing "another tax that discriminates against a rail carrier." By its terms, Subsection (b)(4) reaches beyond the ad valorem property taxes addressed in the preceding provisions "to prevent discriminatory taxation of a railroad carrier by any means." *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

b. In *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994) (*ACF*), this Court addressed the application of Subsection (b)(4) to allegedly discriminatory state property taxes. In particular, the Court considered "[w]hether a tax upon railroad property is even subject to challenge under [S]ubsection (b)(4) on the ground that certain other classes of commercial and industrial property are exempt" from the property tax. *Id.* at 338-339. Ruling against the challenger, the Court concluded that Subsection (b)(4) does not limit States' authority to exempt non-railroad property from taxes that rail carriers are required to pay. See *id.* at 338-348. Accordingly, the Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under [S]ubsection (b)(4)." *Id.* at 340.

This Court explained that "central to the interpretation of [S]ubsection (b)(4)" are the neighboring provisions of Subsections (b)(1)-(3), along with the definition of "other commercial and industrial property" contained in Subsection (a)(4). *ACF*, 510 U.S. at 340. Subsections (b)(1)-(3), which are specific to property taxes, require a comparison between the rate imposed on railroad property and the rate imposed on other "commercial and industrial property." *Ibid.* Subsection (a)(4) identifies the reference point for the inquiries prescribed in Subsections (b)(1)-(3) by defining the term "commercial and industrial property" as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." See *ibid.* In light of that statutory structure, the Court explained, a plaintiff may establish a violation of Subsections (b)(1)-(3) only by showing that railroad property is taxed at a higher rate than non-railroad commercial- or industrial-use property that is actually "subject to a property tax levy" (*i.e.*, not exempt). *Id.* at 340-342. The Court further explained that, because any property that is exempt from state taxation falls outside the 4-R Act's definition of "commercial and industrial property," such "[e]xempt property * * * is not part of the comparison class against which discrimination is measured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions." *Id.* at 342.

Having concluded that Subsections (b)(1)-(3) do not prevent States from taxing railroad property while exempting particular categories of non-railroad property, the *ACF* Court then addressed the question whether such differential taxation is prohibited by Subsection (b)(4). The Court stated that "[i]t would be illogical to conclude that Con-

gress, having allowed the States to grant property tax exemptions in [S]ubsections (b)(1)-(3), would turn around and nullify its own choice in [S]ubsection (b)(4)." 510 U.S. at 343. The Court explained that such a "result would contravene the 'elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Id.* at 340 (quoting *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

This Court further explained that "[o]ther considerations reinforce[d] [this] construction of the statute." *ACF*, 510 U.S. at 343. Because "[p]roperty tax exemptions are an important aspect of state and local tax policy," the Court found that the 4-R Act's "silence on the subject—in [contrast to] the explicit prohibition on tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place." *Id.* at 344. The Court also stated that "[p]rinciples of federalism" counseled against reading Subsection (b)(4) as a "prohibition of property tax exemptions," *id.* at 345, and that the legislative history of the 4-R Act did not support the challenger's position, *id.* at 345-346. The Court therefore sustained Oregon's property tax and exemption scheme.

2. Alabama imposes four-percent sales and use taxes on the retail sale, storage, use, or consumption in Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (LexisNexis Supp. 2009) (sales tax), § 40-23-61(a) (LexisNexis 2003) (use tax). Although the sales and use taxes are generally applicable, state law expressly exempts fuel for use by vessels engaged in interstate or foreign commerce. *Id.* § 40-23-4(a)(10) (LexisNexis Supp. 2009) (exemption from sales tax), § 40-23-62(12) (LexisNexis Supp. 2009) (exemption from use tax). Consequently, water carriers engaged in interstate or foreign

commerce typically do not pay tax to respondents on their motor fuel.

Alabama also imposes primary and additional excise taxes totaling 19 cents per gallon on the receipt of motor fuels, including diesel fuel. Ala. Code § 40-17-2(1) (LexisNexis 2003) (primary motor fuel excise tax), § 40-17-220(e) (LexisNexis Supp. 2009) (additional motor fuel excise tax). Motor fuel subject to the primary excise tax is exempt from the sales and use taxes. *Id.* § 40-17-2(1) (LexisNexis 2003). On-road motor carriers therefore typically pay an excise tax of 19 cents per gallon of fuel to respondents, and they do not pay a sales or use tax on their fuel.

Fuel used in railroad locomotives is generally not subject to Alabama's motor fuel excise taxes. That is because dyed diesel fuel designated for off-road use under 26 U.S.C. 4082—which is what locomotives burn—is exempt from Alabama's primary motor fuels excise tax. Ala. Code § 40-17-2(1) (LexisNexis 2003). In addition, railroad locomotive fuel is expressly exempted from Alabama's additional motor fuels excise tax. *Id.* § 40-17-220(d)(2) (LexisNexis Supp. 2009). Consequently, railroads (along with other off-road diesel users and intrastate water carriers covered by similar excise tax exemptions) typically pay sales or use taxes of four percent to the State, and they do not pay an excise tax on their fuel.[2]

3. Petitioner, a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation

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[2] The foregoing describes only the state level tax scheme. Certain subdivisions of Alabama are authorized to levy taxes. See Ala. Code § 11-3-11(a)(2) (LexisNexis 2008) (powers of county commissions includes levying taxes); Pet. App. 15a; CSX C.A. Reply Br. 14 (discussing cumulative tax rates in Mobile, Birmingham, and Montgomery). The record in this case appears to contain relatively little evidence regarding county or municipal taxes.

Board, sued respondent Alabama Department of Revenue in federal district court under the 4-R Act. Petitioner contended that, by requiring rail carriers to pay sales and use taxes from which motor carriers are exempt, respondents had discriminated against petitioner in violation of 49 U.S.C. 11501(b)(4).

a. In July 2008, the district court granted petitioner's motion for a preliminary injunction against collection of the sales and use taxes. The court held that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, * * * there is reasonable cause to believe that the [4-R] Act has been violated." Pet. App. 12a. The district court also granted respondents' motion to stay further proceedings pending the Eleventh Circuit's decision in *Norfolk Southern Railway Co.* v. *Alabama Department of Revenue*, No. 08-12712, in which a different rail carrier had brought a materially identical challenge to Alabama's sales and use taxes. Dkt. 19 (July 23, 2008).

b. In December 2008, the Eleventh Circuit announced its decision in *Norfolk Southern*, rejecting the rail carrier's challenge there. Pet. App. 13a-38a. The court of appeals in *Norfolk Southern* found this Court's decision in *ACF* controlling. *Id.* at 26a-32a. The court acknowledged that *ACF* involved property taxes rather than use or sales taxes. *Id.* at 29a. The court concluded, however, that this Court's analysis was "equally applicable" to the exemptions from sales and use tax that were at issue in *Norfolk Southern*. *Ibid.*

In discussing *ACF*, the court of appeals did not address whether this Court's structural inference from Subsections (b)(1)-(3) translated from property taxes to sales and use taxes. Rather, it focused on the Court's observations that Subsection (b)(4) does not speak in terms to property tax exemptions; that property tax exemptions were ubiquitous

when the 4-R Act was passed; and that "concerns for state sovereignty" disfavored federal constraints on a State's tax exemptions. Pet. App. 29a-31a. The court of appeals concluded that, because those observations were also applicable to sales and use tax exemptions, such exemptions could not be the basis for a discrimination claim under Subsection (b)(4). *Ibid.* The court stated that its holding aligned it with "other courts that also have applied [*ACF*] to state and local taxes analogous to Alabama's." *Id.* at 31a; see *id.* at 31a n.14 (citing cases). The court of appeals acknowledged, however, that other courts have "scrutinized exceptions to generally applicable *non*-property taxes." *Id.* at 31a; see *id.* at 31a n.15 (citing cases).[3]

c. After the Eleventh Circuit issued its decision in *Norfolk Southern*, the district court in this case *sua sponte* entered an order dissolving its preliminary injunction and dismissing petitioner's suit. Pet. App. 3a. Petitioner appealed and, acknowledging that *Norfolk Southern* was controlling, sought initial hearing en banc. *Id.* at 2a & n.1. The court of appeals denied initial hearing en banc, *id.* at 39a, and a panel subsequently affirmed the district court's

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[3] The *Norfolk Southern* court stated that, although "a tax with widespread exemptions could indicate that a [S]tate has 'single[d] out' the railroad for discriminatory treatment," such was "not the case here." Pet. App. 32a (quoting *ACF*, 510 U.S. at 347) (second pair of brackets in original). The court also rejected the rail carrier's argument that respondents had unlawfully discriminated against rail carriers by "us[ing] the proceeds of the taxes levied on motor carriers to maintain roads [while] railroads do not receive similar subsidies." *Id.* at 35a. The court refused to "compare the sales and use tax to the fuel excise tax, insofar as there are differences in the ways in which their respective proceeds are spent." *Id.* at 36a. The court found it inappropriate "to look past the particular tax at issue to analyze the overall state tax structure," *ibid.*, or to scrutinize "the use to which a state puts its tax revenue," *id.* at 37a.

dismissal order in a per curiam decision resting on *Norfolk Southern*, *id.* at 1a-2a.

## DISCUSSION

In *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994) (*ACF*), this Court addressed the application of Subsection (b)(4) to a state taxing regime under which rail carriers (and related entities) paid a property tax, while certain other persons were exempt. The Court held that Subsection (b)(4) does not provide a basis for challenging that form of differential taxation. This case concerns the application of Subsection (b)(4) to a *non*-property tax scheme under which rail carriers pay a tax, while certain other persons are exempt. The petition presents the threshold question whether such a disparity can ever render a non-property tax invalid under Subsection (b)(4)—or, as this Court put it in *ACF*, whether a taxing decision of this sort is "even subject to challenge" under the 4-R Act, 510 U.S. at 338.[4]

The Ninth and Eleventh Circuits have held that such schemes are not subject to challenge under Subsection (b)(4). By contrast, the Eighth Circuit and two state supreme courts have permitted such challenges (and indeed, have concluded that the taxes in question were invalid). The Eighth Circuit's view of the threshold issue is correct. The text of Subsection (b)(4) encompasses without qualification any "tax that discriminates against a rail carrier." As this Court recognized in *ACF*, 510 U.S. at 343, a State's requirement that rail carriers pay a tax from which others

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[4] The court of appeals acknowledged, and the parties do not appear to dispute in this Court, that Section 11501(b)(4) would condemn a tax from which the so called "exemptions" were so widespread that the tax effectively "singled out railroad[s] * * * for discriminatory treatment," *ACF*, 510 U.S. at 347. That distinct and well-accepted principle is not implicated by the taxes at issue here. See Pet. App. 32a-34a.

are exempt can be a form of tax discrimination. And although the Court in *ACF* held that property tax schemes involving exemptions are not subject to challenge under Subsection (b)(4), the Court's reasoning in that case does not carry over to *non*-property tax regimes.

Although the state taxing regime at issue here is subject to challenge under Subsection (b)(4), that scheme is not necessarily invalid. Respondents may be able to demonstrate, for example, that the challenged sales and use taxes are not discriminatory because persons exempt from those taxes must pay corresponding motor fuel taxes in equal or greater amounts. See Br. in Opp. 8-10. Respondents frame the question presented in such a way as to encompass not only the threshold issue of Subsection (b)(4)'s applicability, but also the ultimate validity of "the State's overall excise tax structure." See *id.* at i.

That ultimate issue, however, is not presently suitable for this Court's review. The factual record is limited because it was developed on a motion for a preliminary injunction and no discovery has yet occurred. Moreover, further consideration by lower courts of the standards for determining whether a tax "discriminates against a rail carrier," 49 U.S.C. 11501(b)(4), would likely assist this Court, especially because courts rejecting Subsection (b)(4) claims at the threshold have had no opportunity to decide those issues.

Accordingly, to resolve the clear split on a threshold issue of the 4-R Act's application, the Court should grant the petition for a writ of certiorari limited to the following question:

> Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to chal-

lenge under 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier."

**A. The Court Of Appeals' Decision Is Incorrect**

This Court held in *ACF* that "a tax upon railroad property is [not] even subject to challenge under [49 U.S.C. 11501(b)(4)] on the ground that certain other classes of commercial and industrial property are exempt." 510 U.S. at 338-339. In *Norfolk Southern* (see Pet. App. 28a-32a) and in this case (*id.* at 1a-2a), the Eleventh Circuit extended that rule to encompass non-property taxes, such as the sales and use taxes at issue here. That threshold rejection of petitioner's challenge was incorrect.

1. Contrary to the court of appeals' analysis, *ACF*'s reasoning does not support the decision below. The Court in *ACF* addressed the application of Subsection (b)(4) to property tax exemptions, see 510 U.S. at 338-339, and did not comment on any other form of tax.[5] Moreover, the *ACF* Court's reasoning does not logically encompass the sales and use taxes at issue here because the Court's structural analysis relied on adjacent 4-R Act provisions that apply solely to property taxes.

The Court in *ACF* relied on the facts that Subsections (b)(1)-(3) establish specific non-discrimination requirements for property taxes, and that those Subsections require a comparison between taxes on rail transportation property and taxes on other "commercial and industrial property." 510 U.S. at 340. Because the term "commercial and industrial property" is limited to specified categories of "prop-

[5] Indeed, *ACF*'s only discussion of tax exemptions in general—as a category broader than property tax exemptions—came in this Court's acknowledgment that "tax exemptions, as an abstract matter, could be a variant of tax discrimination," though "the statute does not speak with any degree of particularity to the question of tax exemptions." 510 U.S. at 343.

erty * * * subject to a property tax levy," *id.* at 341, a phrase the Court construed to mean "taxed property," *id.* at 342, a rail carrier cannot establish a violation of Subsections (b)(1)-(3) by showing that its property is taxed while other property is exempt, see *ibid.* The Court in *ACF* held that such challenges to property-tax exemptions could not go forward under Subsection (b)(4) because "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in [S]ubsections (b)(1)-(3), would turn around and nullify its own choice in [S]ubsection (b)(4)." *Id.* at 343.

The *ACF* Court's structural analysis does not logically apply to the sales and use taxes at issue here. Neither Subsections (b)(1)-(3) nor any other 4-R Act provision establishes specific non-discrimination requirements for non-property taxes. Nor does any 4-R Act provision otherwise suggest that, with respect to allegedly discriminatory sales or use taxes, the only appropriate point of comparison is other *taxed* transactions or activities. Treating petitioner's current challenge as cognizable under Subsection (b)(4) therefore poses no threat of "nullify[ing]" (*ACF*, 510 U.S. at 343) any congressional policy choice reflected in more specific 4-R Act provisions.

Although this Court in *ACF* described its structural analysis as "central to the interpretation of [S]ubsection (b)(4)," 510 U.S. at 340, the Eleventh Circuit did not discuss that analysis in *Norfolk Southern*. Instead, the court of appeals focused on what this Court described as "[o]ther considerations" that "reinforce[d]" the basic structural inference. *Id.* at 343; see Pet. App. 28a-31a. None of those considerations warrants the weight the court of appeals gave it.

First, the court of appeals thought it significant that "Congress could clearly have prohibited * * * exemp-

tions, but did not." Pet. App. 28a. But this Court acknowledged in *ACF* that exemptions can be a form of tax discrimination. See 510 U.S. at 343. The absence of an express mention of one potential method of discrimination (selective exemptions) is of particularly little significance in a catch-all provision like Subsection (b)(4), whose very purpose is to avoid the impractical task of anticipating and enumerating every possible discriminatory mechanism. See, *e.g.*, *Southern Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) ("Congress possessed a general concern with discrimination in all of its guises."), cert. denied, 465 U.S. 1100 (1984).

Second, the court of appeals observed that, "as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted." Pet. App. 30a. Although the Court in *ACF* viewed that state-law backdrop as confirming evidence of Congress's intent to leave property tax exemptions undisturbed, see 510 U.S. at 344, it does not bear the independent weight the court of appeals gave it. Indeed, the Court in *ACF* found preexisting state tax practice relevant only "in light of the explicit prohibition of tax rate and assessment ratio discrimination," *ibid.*—a counterpoint notably absent here. Moreover, the ubiquity of a practice prior to the 4-R Act cannot be a defense to Section 11501's application, because it was precisely the prevalence of discriminatory taxation schemes that prompted Congress to enact the 4-R Act's prohibition.

The court of appeals' third concern—principles of federalism—also carries little weight in this specific context. The 4-R Act is preemptive in its design and by its broad, clear, and express terms. Cf. *CSX Transp. Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 20-21 (2007) ("[E]ven if important questions of state policy are [implicated], judicial scrutiny * * * is authorized by the 4-R Act's clear

command."); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("[T]he language of [Section] 1150[1] plainly declares the congressional purpose."). Thus, any presumption against preemption is overcome by "the clear and manifest purpose of Congress" to preempt any discriminatory tax. *ACF*, 510 U.S. at 345 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Accordingly, *ACF* does not support the court of appeals' decision.

2. The text, structure, and history of the 4-R Act support petitioner's view that a tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under 49 U.S.C. 11501(b)(4). On its face, Subsection (b)(4) reaches beyond property taxes to forbid "another tax"— here, a sales or use tax—"that discriminates against a rail carrier." A rail carrier's showing that it pays a tax, while competitors do not, is a proper basis for challenging the tax under Subsection (b)(4).[6]

The legislative history of the 4-R Act confirms that Subsection (b)(4) is not qualified in the way the court of appeals believed it to be. As the Fifth Circuit explained in connection with a Subsection (b)(4) challenge to Louisiana's gross receipts tax, Congress studied and debated discriminatory property taxation for 15 years before passing the 4-R Act, with its finely calibrated rules about property taxation. *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 372-373 (1987). But Congress "realized near the end [of the legislative process] that banning discriminatory property taxes

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[6] A prima facie showing that the rail carrier is subjected to *differential* taxation does not end the inquiry, because it does not conclusively establish that the "tax * * * *discriminates* against [the] rail carrier." 49 U.S.C. 11501(b)(4) (emphasis added). But neither the standards for resolving that ultimate question, nor their proper application in this case, is presently suitable for this Court's review. See p. 19, *infra*.

was not enough to save the railroads from unfair state taxation. Congress therefore added [Subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Id.* at 373. That history suggests that Congress developed and intended a nuanced scheme for identifying discriminatory property taxes (as this Court recognized in *ACF*), while enacting a more general ban on "discriminat[ion] against a rail carrier" where "another tax" was concerned. 49 U.S.C. 11501(b)(4).

### B. The Clear And Entrenched Split On The Question Presented Warrants Resolution By This Court

The courts of appeals and state supreme courts are squarely divided on the threshold question whether a rail carrier may invoke 49 U.S.C. 11501(b)(4) to challenge a state law under which rail carriers pay a non-property tax while certain other persons (typically competitors) are exempt. The Ninth Circuit in *Atchison, Topeka & Santa Fe Railway Co.* v. *Arizona*, 78 F.3d 438, 443 (*ATSF*), cert. denied, 519 U.S. 1029 (1996), and the Eleventh Circuit in *Norfolk Southern*, Pet. App. 26a-32a, have held that such schemes cannot be challenged under Subsection (b)(4). Both courts concluded that this Court's reasoning in *ACF* applies equally to non-property taxes. See *ATSF*, 78 F.3d at 442-443 ("Although *ACF* specifically addressed property tax exemptions, the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions."); Pet. App. 29a ("*ACF Industries*' construction of the 4-R Act guides our decision.").

By contrast, the Eighth Circuit has entertained rail carriers' challenges under Subsection (b)(4) to state sales and use taxes from which the carriers' direct competitors were exempt. See *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693 (2007) (*UPRR*); *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (1999), cert. denied, 529 U.S.

1098 (2000). Two state supreme courts within the Eighth Circuit have likewise held that such challenges are cognizable under Subsection (b)(4). See *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984); *Burlington N. R.R.* v. *Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000). The Eleventh Circuit in *Norfolk Southern* acknowledged that conflict in authority. See Pet. App. 31a & nn.14-15.

Although this Court has previously denied review of this issue, the Court's intervention is now warranted to resolve the split. When the Court last denied review of this issue, see *Wilson* v. *Burlington N. Santa Fe Ry.*, 529 U.S. 1098 (2000), the Ninth Circuit alone had held challenges like this one to be non-cognizable under Subsection (b)(4), while the Eighth Circuit and the Supreme Courts of Iowa and Minnesota (the latter having ruled shortly after the petition in *Wilson* was filed) had held that such challenges could go forward. At that time, a reversal of course by the Ninth Circuit would have eliminated the split.

But the question presented has continued to arise in litigation,[7] and two recent developments have entrenched the split and made it worthy of this Court's review. First, the Eleventh Circuit denied initial hearing en banc in this

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[7] *Norfolk Southern* and this case, both brought in 2008, have involved challenges to Alabama's sales and use taxes on fuel. A 4-R Act suit brought earlier this year challenging Tennessee's sales and use taxes on fuel has been stayed pending disposition of the instant petition for a writ of certiorari (or the conclusion of this Term). See *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, No. 3:10-CV-197, Docket entry No. 12 (M.D. Tenn. Mar. 29, 2010). *UPRR*, brought in 2004, concerned Minnesota's sales and use taxes on fuel. In another case brought in 2004, the district court enjoined Louisiana's collection of its sales and use tax on fuel from the challenging rail carrier. See *Kansas City S. Ry.* v. *Bridges*, No. 5:04-cv-02547-SMH-MLH, Docket entry No. 33 (W.D. La. May 1, 2007).

case, in full view of the split it had widened with its decision in *Norfolk Southern*. Pet. App. 39a. Second, the Eighth Circuit adhered to *Lohman* in *UPRR*, emphasizing that its "holding in *Lohman* is clear." 507 F.3d at 696. This Court's review is therefore now appropriate.

### C. The Court Should Limit The Question Presented To The Threshold Issue Of Whether Alabama's Sales And Use Taxes Are Subject To Challenge Under Subsection (b)(4)

Respondents reframe the question presented so as to encompass not only the cognizability of petitioner's challenge under Subsection (b)(4), but also the ultimate validity of the State's sales and use taxes. Compare Pet. i with Br. in Opp. i. Respondents argue (*id.* at 8-10) that, even if petitioner's challenge to the State's taxing regime may be brought under Subsection (b)(4), that challenge fails on the merits because petitioner's non-railroad competitors actually pay *higher* taxes, under a different provision of the Alabama Code, on their purchases of diesel fuel.

The government agrees with respondents that, in resolving a claim of unlawful tax discrimination under Subsection (b)(4), a court should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers.[8] This Court should not attempt to decide in the first instance, however, whether petitioner's

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[8] The Eighth Circuit has held that, in resolving challenges to sales and use taxes under Subsection (b)(4), courts should look solely at the taxes that rail carriers are required to pay, and should find that unlawful discrimination has occurred if the rail carriers' competitors are exempt from those taxes, without regard to the remainder of the state taxing scheme. See *UPRR*, 507 F.3d at 695; *Lohman*, 193 F.3d at 986. Although the Eighth Circuit was correct in its threshold determination that Subsection (b)(4) authorizes rail carriers to challenge taxes from which their competitors are exempt, that court used an unduly narrow inquiry to resolve the merits of the rail carriers' discrimination claims.

rights under Subsection (b)(4) have been violated. The record in this case, which was developed in a preliminary injunction proceeding and without discovery, is insufficient to resolve issues beyond the threshold question framed in the petition. Moreover, assessing petitioner's claim on the merits could require this Court to resolve a number of subsidiary legal questions that were not addressed (or were addressed only briefly) by the courts below.

As the government's amicus brief in *ACF* explained, the 4-R Act prohibits "[e]conomic 'discrimination,'" which "exists when [two classes of economic actors] are treated differently without an acceptable justification." Gov't Br. at 17, *ACF*, *supra* (No. 92-74). That test implicates legal questions, such as how much differential treatment is necessary for a prima facie showing, and what justifications a State may advance in defense of its tax scheme. But the ultimate question of discrimination necessarily entails a factual inquiry. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 293 (1982) (holding that discrimination under Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), "is a factual matter subject to the clearly- erroneous standard of Rule 52(a)"). Thus, if this Court grants certiorari and holds that petitioner's challenge is cognizable under Subsection (b)(4), the lower courts may need to consider on remand such factors as the nature of the distinctions Alabama's tax laws draw among rail carriers and their competitors, the extent to which those competitors are subject to the motor fuel excise tax, the legal implications of the parallel tax scheme, and the relevance of any taxes imposed by Alabama's political subdivisions.[9]

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[9] The court in *Norfolk Southern* did not resolve any of these issues in a way that would prevent petitioner from ultimately prevailing on remand. The *Norfolk Southern* court did, however, foreclose a claim of

Petitioner's formulation of the question presented, which asks whether "a State's exemption * * * is subject to challenge," Pet. i, is not entirely satisfactory either. That wording is imprecise because the relief in a successful Section 11501(b)(4) challenge is not to undo the putatively favorable tax treatment accorded to non-rail carriers (here, the exemption of certain non-rail carriers from Alabama's sales and use taxes). As this Court has explained in connection with constitutional challenges to state taxes, a federal court may not "decree a valid tax for the invalid one which the State ha[s] attempted to exact"; rather, the appropriate decree is that the invalid tax "may not be exacted." *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 752 (1961) (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960)). For that reason, petitioner's Subsection (b)(4) suit is properly viewed as challenging the allegedly discriminatory tax imposed on rail carriers, not the exemption granted to their competitors. See 49 U.S.C. 11501(b)(4) (providing that a State may not "[i]mpose a[] tax that discriminates against a rail carrier").[10]

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discrimination based on the manner in which tax proceeds are used. See Pet. App. 36a-37a. This Court need not decide whether that holding is correct in order to hold that petitioner's challenge is cognizable under Subsection (b)(4).

[10] In the 4-R Act, Congress prescribed a remedial approach somewhat different from this Court's approach in constitutional challenges. Under *Moses Lake*, a constitutionally invalid tax should be enjoined *in toto*. By contrast, the 4-R Act's legislative history specifically rejects the *Moses Lake* approach and indicates that, under the remedial provisions of 49 U.S.C. 11501(c), "[t]here is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion." S. Rep. No. 630, 91st Cong., 1st Sess. 13 (1969). This only underscores, however, that it is the tax, not the exemption, that a rail carrier must challenge.

The United States therefore respectfully suggests that, if this Court grants the petition for a writ of certiorari, it should limit the grant as described above. If this Court grants certiorari and ultimately reverses the judgment of the court of appeals, the lower courts on remand can determine whether Alabama's overall scheme of taxes on diesel fuel "discriminates against a rail carrier" within the meaning of Subsection (b)(4). But an appropriately drawn question presented would productively focus the briefing in this Court on the threshold issue that presently divides the lower courts and which this case is an appropriate vehicle to resolve.

## CONCLUSION

The petition for a writ of certiorari should be granted limited to the following question:

> Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier."

Respectfully submitted.

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MAY 2010

# JOINT APPENDIX

Supreme Court, U.S.
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No. 09-520

IN THE

# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## JOINT APPENDIX

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NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 09-520 Petition For A Writ Of Certiorari at the following pages:

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*CSX Transportation, Inc.* v. *Ala. Dep't of Revenue*, No 09-10772 (11th Cir. Aug. 20, 2009) ..... 39a

U.S. DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
(SOUTHERN)

Date Filed: 04/14/2008
Case Number: 2:08-cv-00655-UWC

CSX TRANSPORTATION, INC.
*Plaintiff,*

v.

ALABAMA DEPARTMENT OF REVENUE *et al.*
*Defendants.*

**RELEVANT DOCKET ENTRIES**

| DATE | # | DOCKET TEXT |
|---|---|---|
| 04/14/2008 | 1 | COMPLAINT against Alabama Department of Revenue, Tim Russell (Filing Fee $ 350 Paid), filed by CSX Transportation, Inc. (SRJ,) (Entered: 04/16/2008) |
| 04/14/2008 | 2 | NOTICE of Corporate Disclosure by CSX Transportation, Inc. (SRJ,) (Entered: 04/16/2008) |
| 04/14/2008 | | Summons Issued and delivered to plaintiff for service as to defendants Alabama Department of Revenue, and Tim Russell. (SRJ,) (Entered: 04/16/2008) |
| 04/16/2008 | 3 | MOTION for Leave to Appear pro hac vice by CSX Transportation, Inc. (Hinton, J) (Entered: 04/16/2008) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 04/16/2008 | | SUMMONS Returned Executed executed upon dft Alabama Department of Revenue served on 4/16/2008, answer due 5/6/2008; dft Tim Russell served on 4/16/2008, answer due 5/6/2008. (SRJ,) (Entered: 04/24/2008) |
| 04/17/2008 | | ORDER granting 3 Motion for Leave to Appear PHV. Signed by Judge U W Clemon on 4/17/2008. (KAM,) (Entered: 04/17/2008) |
| 04/17/2008 | | PHV Fee paid for attorneys James W. McBride and Stephen D. Goodwin on behalf of plaintiff in the amount of $100.00, Receipt Number 200 245943. (SRJ,) (Entered: 04/22/2008) |
| 05/01/2008 | 4 | ANSWER to Complaint by Alabama Department of Revenue, Tim Russell. (McNeill, Margaret) (Entered: 05/01/2008) |
| 05/29/2008 | 5 | MOTION for Preliminary Injunction by CSX Transportation, Inc. (Hinton, J) (Entered: 05/29/2008) |
| 05/29/2008 | 6 | Brief re 5 MOTION for Preliminary Injunction filed by CSX Transportation, Inc. (Attachments: #1 Supplement Addendum A, #2 Supplement Addendum B, #3 Supplement Addendum C) (Hinton, J) (Entered: 05/29/2008) |

| DATE | NO. | PROCEEDINGS |
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| 05/29/2008 | 7 | NOTICE by CSX Transportation, Inc. re 5 MOTION for Preliminary Injunction (Attachments: #1 Affidavit Affidavit of Sean M. Craig in Support of Motion for Preliminary Injunction) (Hinton, J) (Entered: 05/29/2008) |
| 06/05/2008 | 8 | NOTICE of Hearing on Motion 5 MOTION for Preliminary Injunction: Motion Hearing set for 6/25/2008 at 10:00 AM in Birmingham, Alabama before Judge U W Clemon. (KLL,) cm Modified on 6/5/2008 (KLL,). (Entered: 06/05/2008) |
| 06/06/2008 | 9 | REPLY Brief filed by Defendants Alabama Department of Revenue, Tim Russell re: 5 MOTION for Preliminary Injunction, 6 Brief *Response to Plaintiff's Request for Preliminary Injunction* filed by Alabama Department of Revenue, Tim Russell. (Attachments: #1 Appendix Exhibit A, part 1, #2 Appendix Exhibit A, part 2, #3 Appendix Exhibit B, part 1, #4 Appendix Exhibit B, part 2, #5 Appendix Exhibit B, part 3) (McNeill, Margaret) (Entered: 06/06/2008) |
| 06/13/2008 | 10 | REPLY to Response to Motion re 5 MOTION for Preliminary Injunction filed by CSX Transportation, Inc. (Hinton, J) (Entered: 06/13/2008) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 06/18/2008 | 11 | MOTION for Leave to File *Supplement to its Motion for Preliminary Injunction* by CSX Transportation, Inc. (Attachments: #1 Exhibit Exhibit 1 - Affidavit of Vickie J. Friedman, #2 Exhibit Attachment A to Exhibit 1) (Hinton, J) (Entered: 06/18/2008) |
| 06/20/2008 | 12 | STIPULATION re 5 MOTION for Preliminary Injunction *(Joint)* by CSX Transportation, Inc. (McBride, James) (Entered: 06/20/2008) |
| 06/25/2008 | | Minute Entry for proceedings held before Judge U W Clemon: Motion Hearing held on 6/25/2008 re 5 MOTION for Preliminary Injunction filed by CSX Transportation, Inc., 11 MOTION for Leave to File Supplement to its Motion for Preliminary Injunction filed by CSX Transportation, Inc. The Court will enter a separate order. (Court Reporter Penny Enoch.) (KLL,) (Entered: 06/25/2008) |
| 07/08/2008 | 13 | MEMORANDUM OPINION In Re Plaintiff's Motion for Preliminary Injunction. Signed by Judge U W Clemon on July 8, 2008. (SRJ,) (Entered: 07/08/2008) |
| 07/08/2008 | 14 | PRELIMINARY INJUNCTION consistent with accompanying Memorandum Opinion 13 it is ORDERED that the defendants Alabama Department of Revenue and Tim Russell are hereby PRELIMINARILY ENJOINED |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | AND RESTRAINED from assessing, levying, and/or collecting taxes on diesel fuel purchases and use by CSXT, Inc., pending a trial and determination on the merits of plaintiff's complaint; Plaintiff SHALL PAY disputed tax funds AS SET OUT in this Order. Signed by Judge U W Clemon on July 8, 2008. (SRJ,) (Entered: 07/08/2008) |
| 07/09/2008 | 15 | ORDER Rule 26 Meeting Report due by 7/18/2008. Signed by Judge U W Clemon on July 9, 2008. (SRJ,) (Entered: 07/09/2008) |
| 07/16/2008 | 16 | TRANSCRIPT of PRELIMINARY INJUNCTION HEARING Proceedings held on June 25, 2008, before Judge U W Clemon. NOTICE: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. (See Transcript Redaction Policy) (SRJ,) (Entered: 07/16/2008) |
| 07/18/2008 | 17 | REPORT of Rule 26(f) Planning Meeting. (Hinton, J) (Entered: 07/18/2008) |
| 07/23/2008 | 18 | MOTION to Stay *Proceedings* by Alabama Department of Revenue, Tim Russell. (McNeill, Margaret) (Entered: 07/23/2008) |

| DATE | NO. | PROCEEDINGS |
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| 07/23/2008 | 19 | ORDER GRANTING defendant's 18 Motion to Stay [NO WRITTEN ORDER]. Signed by Judge U W Clemon on July 23, 2008. (SRJ, APreq) (Entered: 07/23/2008) |
| 07/29/2008 | 20 | SUMMONS of Preliminary Injunction Returned Executed upon dft Alabama Department of Revenue served on 7/22/2008. (SRJ,) (Entered: 07/29/2008) |
| 08/21/2008 | 21 | NOTICE by CSX Transportation, Inc. *of Establishment of Escrow Fund* (Hinton, J) (Entered: 08/21/2008) |
| 12/16/2008 | 22 | ORDER DISMISSING CASE. Signed by Judge U W Clemon on 12/16/08. (Clemon, U) (Entered: 12/16/2008) |
| 01/15/2009 | 23 | NOTICE OF APPEAL by defendant CSX Transportation, Inc., re 22 Order Dismissing Case *Notice of Appeal* (Hinton, J) Modified on 1/29/2009 (SRJ,). (Entered: 01/15/2009) |
| 01/15/2009 | | NOTICE OF APPEAL by CSX Transportation, Inc. See document 23 (KAM,) (Entered: 05/26/2009) |
| 01/29/2009 | | TRANSMISSION of Notice of Appeal and Docket Sheet to U.S. Court of Appeals. (SRJ,) (Entered: 01/29/2009) |
| 02/13/2009 | 24 | NOTICE of SECOND Transmission of Notice of Appeal and Certified copy of Docket Sheet to the U.S. Court of Appeals. (SRJ,) (Entered: 02/13/2009) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 02/13/2009 | | Remark APPEAL FILING FEE paid 1/15/2009 in the amount of $455.00, Receipt #200 253292. (SRJ,) (Entered: 02/13/2009) |
| 02/24/2009 | 25 | STIPULATION *FOR DISBURSEMENT OF ESCROWED FUND* by CSX Transportation, Inc. (Attachments: #1 Exhibit A, #2 Text of Proposed Order) (Hinton, J) (Entered: 02/24/2009) |
| 02/24/2009 | 26 | NOTICE of U.S. Court of Appeals Case Number: 09-10772-F (SRJ,) (Entered: 02/24/2009) |
| 05/26/2009 | | Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Northern District of Alabama certifies that the record is complete for purposes of this appeal re: Notice of Appeal, Appeal No. 09-10772. The entire record on appeal is available electronically. (SRJ,) (Entered: 05/26/2009) |
| 09/03/2009 | 27 | ORDER of USCA as to Notice of Appeal 23 filed by CSX Transportation Inc.; The District Court's judgment is hereby AFFIRMED by the US Court of Appeals before Circuit Judges BLACK, BARKETT, and HILL entered 9/1/2009. (SRJ,) (Entered: 09/04/2009) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 09/30/2009 | 28 | USCA JUDGMENT that the Court's decision is AFFIRMED issued as mandate 9/30/2009 before USCA Circuit Judges BLACK, BARKETT, and HILL w/slip opinion attached as to Notice of Appeal. (SRJ,) (Entered: 10/07/2009) |
| 11/16/2009 | 29 | ORDER for disbursement of escrowed funds as set out in this order. Signed by Chief Judge Sharon Lovelace Blackburn on 11/16/2009. (KAM,) (Entered: 11/16/2009) |

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed: 02-13-2009
Case Number: 09-10772-FF

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CSX TRANSPORTATION, INC.

v.

AL DEPT. OF REVENUE

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**RELEVANT DOCKET ENTRIES**

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 02/13/2009 | Fee Status: Paid (02/13/09) for CSX Transportation, Inc. | CSX Transportation, Inc. | No |
| 02/17/2009 | Civil Appeal Statement Form: | CSX Transportation, Inc. | No |
| 02/17/2009 | Transcript Order Form (All Necessary Transcripts on File): | CSX Transportation, Inc. | No |
| 02/20/2009 | Briefing Notice Issued | | No |
| 02/20/2009 | DKT7CIV (Docketing Notice confirming brief due date) issued. To: J. Forrest Hinton, Jr.; c: James W. McBride; c: Margaret Johnson McNeill; c: Sharon Harris; c: Stephen D. Goodwin | | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 02/23/2009 | Probable Jurisdiction Noted: | CSX Transportation, Inc. | No |
| 02/27/2009 | Appearance Form Submitted. | J. Forrest Hinton, Jr. | No |
| 02/27/2009 | Certificate of Interested Persons: (Atty: J. Forrest Hinton, Jr.) | CSX Transportation, Inc. | No |
| 03/05/2009 | Appearance Form Submitted. | Margaret Johnson McNeill | No |
| 03/05/2009 | Appearance Form Submitted. | Glenmore Patrick Powers, II | No |
| 03/06/2009 | Appearance Form Submitted. | Stephen D. Goodwin | No |
| 03/06/2009 | Appearance Form Submitted. | James W. McBride | No |
| 03/20/2009 | Unopposed Motion for Extension to File Appellant Brief and Record Excerpts pending the court's ruling on the petition for hearing en banc or, in the alternative for a 30-day extension to file the same.: (Atty: James W. McBride) | CSX Transportation, Inc. | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 03/20/2009 | Petition for Initial Hearing En Banc: (Atty: James W. McBride) | CSX Transportation, Inc. | No |
| 03/27/2009 | Unopposed Motion for Extension to File Appellant Brief pending the court's ruling on the petition for hearing en banc is DENIED, the alternative motion for extension is GRANTED up to and including 4/30/09 (SHB) | | No |
| 03/27/2009 | MOT2 (Notice of court action) issued. c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: James W. McBride; c: Margaret Johnson McNeill; c: Stephen D. Goodwin | | No |
| 04/30/2009 | Appellant Brief Filed: M5/07/09. PT'D Missing Original signature on COS, TRR (Atty: James W. McBride) | CSX Transportation, Inc. | No |
| 04/30/2009 | Expanded Record Excerpts (E: ROA Program): M5/07/09. PT'D TRR, not expanded. (Atty: James W. McBride) | CSX Transportation, Inc. | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 05/01/2009 | BR7 (Brief deficiency letter) issued. To: James W. McBride; c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: Margaret Johnson McNeill; c: Stephen D. Goodwin | | No |
| 05/01/2009 | EXC-4 (Expanded Record Excerpts deficiency letter) issued. To: James W. McBride; c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: Margaret Johnson McNeill; c: Stephen D. Goodwin | | No |
| 05/01/2009 | E-Brief Tendered: Appellant by Stephen D. Goodwin | CSX Transportation, Inc. | No |
| 05/07/2009 | E-Brief Tendered: Appellant by Stephen D. Goodwin | CSX Transportation, Inc. | No |
| 05/22/2009 | E-Brief Tendered: Appellee by Margaret Johnson McNeill for the State of Alabama Department of Revenue and Tim Russell, Commissioner of Revenue. | Alabama Department of Revenue | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 05/26/2009 | Appellee Brief Filed: (Atty: Margaret Johnson McNeill) | Alabama Department of Revenue | No |
| 05/27/2009 | EXC-2 (Failure to file Expanded Record Excerpts letter) issued. To: Margaret Johnson McNeill; c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: James W. McBride; c: Stephen D. Goodwin | | No |
| 06/05/2009 | E-Brief Tendered: Reply by Stephen D. Goodwin | CSX Transportation, Inc. | No |
| 06/05/2009 | Motion for Leave to File Supplemental Expanded Record Excerpts Out of Time: (Atty: Margaret Johnson McNeill) | Alabama Department of Revenue | No |
| 06/05/2009 | Appellant's Supplemental Expanded Record Excerpts: (Atty: Stephen D. Goodwin) | CSX Transportation, Inc. | No |
| 06/05/2009 | Reply Brief Filed: (Atty: Stephen D. Goodwin) | CSX Transportation, Inc. | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 06/08/2009 | Attorney Changed for: CSX Transportation, Inc. From: James W. McBride (202) 508-3400 jmcbride @bakerdonelson.com To: Goodwin, Stephen D. | CSX Transportation, Inc. | No |
| 06/17/2009 | Motion for Leave to File Supplemental Expanded Record Excerpts Out of Time: is granted. SM | | No |
| 06/17/2009 | MOT2 (Notice of court action) issued. To: Margaret Johnson McNeill; c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: James W. McBride; c: Stephen D. Goodwin | | No |
| 06/17/2009 | Appellee Supplemental Expanded Record Excerpts (E:ROA Program): (Atty: Margaret Johnson McNeill) | Alabama Department of Revenue | No |
| 08/20/2009 | No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Fed.R. App.P), the Petition for Hearing En Banc is DENIED. | | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 08/20/2009 | MOT2 (Notice of court action) issued. c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: James W. McBride; c: Margaret Johnson McNeill; c: Stephen D. Goodwin | | No |
| 09/01/2009 | Judgment Entered | | No |
| 09/01/2009 | OPIN1A (Notice of issuance of opinion) issued. costs taxed against appellant. c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; c: James W. McBride; c: Margaret Johnson McNeill; c: Stephen D. Goodwin; c: U. W. Clemon | | No |
| 09/01/2009 | Opinion Issued | | No |
| 09/30/2009 | CASE CLOSED-Mandate Issued | | No |
| 09/30/2009 | Mandate Issued | | No |
| 09/30/2009 | MDT1 (Letter issuing mandate) issued. To: Sharon Harris; c: Glenmore Patrick Powers, II; c: J. Forrest Hinton, Jr.; | | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| | c: James W. McBride; c: Margaret Johnson McNeill; c: Stephen D. Goodwin | | |
| 11/05/2009 | Notice of Filing Certiorari: SC #09-520 (Atty: Stephen D. Goodwin) | CSX Transportation, Inc. | No |
| 06/14/2010 | Certiorari Granted: SC #09-520 (Atty: Stephen D. Goodwin) | CSX Transportation, Inc. | No |

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed 2008 APR-14]

Case No. CV-08-C-0655-S

CSX TRANSPORTATION, INC.,
*Plaintiff,*

v.

ALABAMA DEPARTMENT OF REVENUE and
TIM RUSSELL, Commissioner of the Alabama
Department of Revenue,
*Defendants.*

# COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FROM DISCRIMINATORY STATE TAXATION

1. This is a civil action seeking to restrain and enjoin defendants, and all those acting in concert or participating with them, from assessing, levying, or collecting from plaintiff Alabama sales and use taxes on plaintiff's purchase or consumption of diesel fuel and gasoline used for rail transportation purposes in Alabama.

2. Plaintiff contends that defendants' imposition of Alabama sales and use taxes on diesel fuel and gasoline purchased and used for rail transportation purposes is discriminatory and unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54

(February 5, 1976), now codified as 49 U.S.C. § 11501 and referred to herein as "Section 306." Plaintiff also seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that defendants' imposition of sales and use taxes on the purchase and consumption of diesel fuel and gasoline for rail transportation purposes in Alabama violates Section 306.

## JURISDICTION

3. Jurisdiction of this Court is based upon the following grounds:

(a) Section 306(1), which confers jurisdiction upon district courts of the United States to prevent a state, subdivision of a state, or any governmental entity or person acting for a state or subdivision, from imposing discriminatory taxes on common carriers by rail;

(b) 28 U.S.C. §1331 [as more fully appears herein, this action arises under the U.S. Constitution, Art I, §8, Cl. 3 (Commerce Clause), and Amend. XIV, and presents a federal question].

## VENUE

4. The defendants have offices in this district, and a substantial number of the actions complained of have and will occur in this district, and thus venue lies in this Court under 28 U.S.C. §1391(b).

## PARTIES

5. Plaintiff CSX Transportation, Inc. ("CSXT") is a Virginia corporation with its principal place of business located in Jacksonville, Florida. CSXT is engaged in interstate commerce as a common carrier by railroad.

6. The Alabama Department of Revenue ("Department") is the department of the State of Alabama charged with the responsibility to administer and collect taxes within Alabama, including the administration of sales and use taxes.

7. Defendant Tim Russell is the Commissioner of Revenue of the State of Alabama ("Commissioner"), and is named in this action in his official capacity only. As Commissioner, Mr. Russell exercises general supervision over administration of the assessment and taxation laws of Alabama, including those imposing sales and use taxes.

## ALABAMA SALES AND USE TAXES

8. Generally, Alabama imposes sales tax on the gross receipts from the business of selling at retail or renting tangible personal property, or of furnishing entertainment.

9. The sales tax is imposed on retailers, including operators of places of amusement.

10. Although it is collected from retailers, the Alabama sales tax is conclusively presumed to be a direct tax on the retail consumer, and is precollected from retailers for convenience and facility only. Ala. Code § 40-23-26(c)(2003 Repl.).

11. Alabama imposes a use tax on the storage, use or consumption of tangible personal property in Alabama. Ala. Code §40-23-60(2003 Repl.), *et seq.*

12. The Commissioner, acting through the Alabama Department of Revenue, collects and administers Alabama sales and use taxes.

13. Revenues from the Alabama sales and use tax are deposited in the State Treasury for disposition as

allocated in Ala. Code § 40-23-35 and 40-23-85 (2003 Repl.). Railroads are not express beneficiaries of the sales and use taxes they pay to the State.

14. Railroads are subject to sales or use tax on either their purchase or consumption or use of diesel fuel in this State. The tax is imposed by the State at the rate of 4%, plus additional amounts imposed at varying rates by many Alabama counties and municipalities.

15. CSXT holds a direct pay permit issued by the Department and pays state and local use taxes upon its use or consumption of diesel fuel within this State.

16. The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property in interstate commerce ("motor carriers") and carriers of property in interstate commerce by ships, barges and other vessels ("water carriers"). Air carriers also are engaged in the transportation of property in interstate commerce in the State of Alabama, but only marginally compete with rail carriers due to the relatively small size and weight of the property transported by air carriers.

17. Motor carriers are exempt from sales or use tax on the purchase or consumption of diesel fuel in the State of Alabama. Ala. Code §§ [sic] 40-17-2(1)(2003 Repl.).

18. Water carriers are exempt from sales or use taxes on their purchase or consumption of diesel fuel in the State of Alabama used for interstate transportation. Ala. Code § 40-23-4(a)(10)(2003 Repl.)(sales tax); Ala. Code § 40-23-62(12)(2003 Repl.)(use tax). While water carriers are subject to sales and use tax

on fuel used for intrastate shipments, only 0.5% of water carriage tonnage is intrastate.

19. Fuel costs incurred in the transportation of property in interstate commerce are a major annual operating expense of rail carriers, motor carriers and water carriers

SECTION 306

20. Section 306 (a copy of which is attached hereto) declares that discriminatory taxation of transportation property by states, political subdivisions of a state, or governmental entities or persons acting on behalf of such states or subdivisions, is unlawful and constitutes an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. Section 306 states, in part:

> (1) . . . [A]ny action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or a person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> * * * * [Subsections (a) through (c) deal with discriminatory property taxes.]
>
> (d) *The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.*

(Emphasis added.)

## PLAINTIFF'S SECTION 306 CLAIM

21. CSXT restates by reference the allegations of paragraphs 1 through 20 of this complaint.

22. CSXT is a "common carrier by railroad" within the meaning of Section 306(1)(d).

23. CSXT's principal competitors are motor carriers and water carriers.

24. Ships and barges are not subject to any Alabama sales and use taxes on their purchase and consumption of petroleum products used for transportation purposes other than for intrastate transportation, which is *de minimis*.

25. Motor carriers are not subject to sales and use taxes on their purchase or consumption of petroleum products used for transportation purposes.

26. The imposition of Alabama sales and use taxes on CSXT's purchase and consumption of diesel fuel and gasoline used for rail transportation purposes is discriminatory and unlawful under Section 306(1)(d) where motor carriers and water carriers are not subject to sales and use taxes on their purchase and consumption of diesel fuel and gasoline used for transportation purposes.

27. CSXT is being required to pay taxes in violation of Section 306(1)(d) by the Commissioner. CSXT has ceased to pay this discriminatory and illegal tax. By letter dated January 2, 2008, CSXT notified the Alabama Department of Revenue and several local jurisdictions that it would not be paying further sales and use taxes on diesel fuel purchases because of recent federal precedent finding such taxes violative of Section 306. CSXT has reasonable cause to believe that the Commissioner will violate Section 306(1)(d)

by bringing proceedings to assess and enforce payment of the tax.

28. Unless the Department and the Commissioner, and all those acting in concert or participating with them are preliminarily and permanently enjoined from assessing, levying, or collecting sales and use taxes from CSXT or from CSXT's vendors on CSXT's purchase and consumption of diesel fuel and gasoline for rail transportation purposes, CSXT will be compelled to pay substantial discriminatory taxes wrongfully imposed in violation of Section 306(1)(d).

WHEREFORE, CSXT requests that this Court:

(1) Preliminarily and permanently enjoin the defendants, and all those acting in concert or participating with them, from assessing, levying, or collecting sales and use taxes from CSXT or from any person paying on behalf of CSXT on its purchase or consumption of diesel fuel and gasoline for rail transportation purposes; and

(2) Preliminarily and permanently enjoin the defendants, and all those acting in concert or participating with them, from instituting any proceedings to assess, levy, or collect any amount of sales and use taxes, interest, or penalties that the defendants might assert to be due and owing from CSXT on its purchase or consumption of diesel fuel and gasoline for rail transportation purposes; and

(3) Declare that defendants' imposition of Alabama sales and use tax on CSXT's purchases or consumption of diesel fuel and gasoline for rail transportation purposes violates Section 306(1)(d); and

(4) Award plaintiff its costs and such further equitable relief to which it may be entitled.

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By: /s/ J. Forrest Hinton
Attorneys for Plaintiff

## Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976

Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision(a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in

accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term –

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a

commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed: 2008 May-29]

---

Case No. CV-08-C-0655-S
"Opposed"

---

CSX TRANSPORTATION, INC.,
*Plaintiff,*

v.

ALABAMA DEPARTMENT OF REVENUE and
TIM RUSSELL, Commissioner of the Alabama
Department of Revenue,
*Defendants.*

---

# PLAINTIFF CSX TRANSPORTATION INC.'S MOTION FOR PRELIMINARY INJUNCTION

On May 22, 2008, James W. McBride and Stephen D. Goodwin, counsel for plaintiff, spoke with Margaret Johnson McNeill, counsel for defendants, concerning plaintiff's plan to seek a preliminary injunction. Ms. McNeil [sic] stated that the defendants will oppose the motion.

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, plaintiff CSX Transportation, Inc. respectfully requests that this court issue a preliminary injunction enjoining the defendants, and all those acting in concert or participating with them, from assessing, levying, or collecting sales and use taxes from CSX Transportation, Inc. ("CSXT") or from any person paying on behalf of CSXT on CSXT's purchase

or consumption of diesel fuel and gasoline for rail transportation purposes; and that this Court preliminarily enjoin the defendants, and all those acting in concert or participating with them, from instituting any proceedings to assess, levy, or collect any amount of sales and use taxes, interest, or penalties that the defendants might assert to be due and owing from CSXT on its purchase or consumption of diesel fuel and gasoline for rail transportation purposes.

The plaintiff further requests that the Court set a hearing date for this motion.

This motion is supported by the pleadings, the Affidavit of Sean M. Craig, and the accompanying memorandum of law.

Respectfully submitted,

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By: /s/ J. Forrest Hinton
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed 2008 Jun-18]

Case No. CV-08-C-0655-S

CSX TRANSPORTATION, INC.,
*Plaintiff*,

v.

ALABAMA DEPARTMENT OF REVENUE and
TIM RUSSELL, Commissioner of the Alabama
Department of Revenue,
*Defendants*.

## PLAINTIFF CSX TRANSPORTATION INC.'S MOTION FOR LEAVE TO SUPPLEMENT ITS PRELIMINARY INJUNCTION PLEADINGS

Plaintiff CSX Transportation, Inc. ("CSXT") moves this Court for leave to supplement its previously filed Motion for Preliminary Injunction (Doc. No. 5) with a subsequently obtained affidavit, and as grounds therefor shows as follows:

1. On May 29, 2008, CXST filed its Motion for Preliminary Injunction, which was accompanied by the Affidavit of Sean M. Craig.

2. Fed. R. Civ. P. 6(c)(2) provides that "any affidavit supporting a motion must be served with the motion."

3. The supplemental Affidavit of CSX Corporation's Director-Sales Tax, Vickie J. Friedman, serves to clarify, amplify, and more clearly explain para-

graph 4 of the aforementioned Affidavit of Sean M. Craig in that it details the breakdown of the taxes paid to the State, counties, and municipalities by CSXT in 2006 and 2007.

4. A copy of the supplemental Affidavit of Vickie J. Friedman is attached hereto as Exhibit 1.

5. The Defendants will not be prejudiced by the supplementation of the record with this affidavit, as it will have been provided to them well in advance of the hearing scheduled for the morning of June 25, 2008.

WHEREFORE, Plaintiff CSX Transportation, Inc. respectfully requests the Court for leave to supplement its previously filed motion with the Affidavit of Vickie Friedman.

Respectfully submitted, this 18th day of June, 2008.

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s/ J. Forrest Hinton
J. FORREST HINTON
One of the Attorneys for
Plaintiff

[EXHIBIT 1]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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Case No. CV-08-C-0655-S

---

CSX TRANSPORTATION, INC.,
*Plaintiff*,

v.

ALABAMA DEPARTMENT OF REVENUE and
TIM RUSSELL, Commissioner of the Alabama
Department of Revenue,
*Defendants*.

---

# AFFIDAVIT OF VICKIE J. FRIEDMAN IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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STATE OF FLORIDA

COUNTY OF DUVALL

Vickie J. Friedman, having been first duly sworn, hereby states as follows:

1. I am Director - Sales Tax for CSX Corporation. In that position, I am familiar with the sales and use taxes paid by CSX Transportation, Inc. ("CSXT") in various states, counties, and municipalities in which CSXT operates.

2. CSXT has paid sales and use taxes in Alabama on the purchase and use of diesel fuel. The state tax

rate is 4% of the purchase price. In 2006, CSXT paid $1,898,649.88 to the Alabama Department of Revenue in sales and use tax on diesel fuel. In 2007, CSXT paid $1,511,052.84.

3. In addition to the state rate of 4%, CSXT pays additional sales and use tax on its diesel fuel because of taxes imposed by the Counties of Jefferson, Mobile, Montgomery, and Shelby; and the municipalities of Birmingham, Mobile and Montgomery.

4. The combined state, county and municipal rates of sales and use tax on CSXT's diesel fuel is eight or nine percent (8-9%) in Birmingham (depending on whether the tax is applied in Jefferson or Shelby County); nine percent (9%) in Mobile; and ten percent (10%) in Montgomery.

5. In summary, for 2006 and 2007, CSXT paid the following sales and use taxes on its purchase and use of diesel fuel in Alabama;

| YEAR | STATE | CITY/COUNTY | TOTAL |
|---|---|---|---|
| 2006 | $1,898,649.88 | $2,209,650.56 | $4,108,300.44 |
| 2007 | 1,511,052.84 | 1,511,238.80 | 3,022,291.64 |

6. Beginning with the returns due for November 2007, CSXT ceased paying sales and use taxes on diesel fuel in Alabama because of recent federal court decisions holding that the imposition of sales and use taxes on railroad diesel fuel violated federal law. *See* Affidavit of Sean M. Craig in Support of Plaintiff CSX Transportation, Inc.'s Motion for Preliminary Injunction, ¶5, filed May 29, 2008.

7. Shelby County has sent CSXT a "Notice of Assessment" and invoice seeking over $100,000 in

taxes, interest, and a penalty of 10%, for the period November 2007 through April 2008. *See* Attachment A.

Affiant further sayeth not.

/s/ Vickie J. Friedman
Vickie J. Friedman

SWORN TO AND SUBSCRIBED before me this 18th day of June, 2008.

/s/ Babette M. Altizer
Notary Public

My commission Expires:

[NOTARY STAMP]

[ATTACHMENT A TO EXHIBIT 1]

SHELBY COUNTY BUSINESS REVENUE OFFICE
SALES/USE, RENTAL/LEASE,
TOBACCO, LODGING TAX
P.O. Box 800
COLUMBIANA, AL 35051

[Logo]

Cheryl D. Naughter, CFA,
Accounting Manager
Patricia A. Ross, Supervisor
Tel. (205) 669-3706
FAX (205) 669-8781

May 30, 2008

CSX Corporation
Attn: Sean M. Craig
Tax Department — J910
500 Water Street
Jacksonville, FL 32202

Re: Assessment of taxes due Shelby County, Alabama for Use tax. Taxpayer ID 105894-1

Dear Mr. Craig:

This letter serves as a notice of assessment of taxes owed by CSX Corporation to Shelby County. This assessment is based on the estimated amount of use tax that you have paid previously on diesel fuel purchases. If you wish to submit actual amounts we will adjust this invoice accordingly.

This invoice is due 30 days from receipt of this letter. If you have any questions, please call me at (205) 669-3706.

Sincerely,

/s/ Patricia A. Ross
Patricia A. Ross
Shelby County Business Revenue
Supervisor

Enclosures

cc: Alex Dudchock, County Manager
Frank C. Ellis, Jr., County Attorney
William B. Burbage, Jr., Finance Manager

Shelby County

Business Revenue

P.O. Box 800
Columbiana, AL 35051
Phone (205) 669-3706
Fax (205) 669-8781

INVOICE

INVOICE #06030001
DATE: MAY 30, 2008

TO:

CSX Transportation Inc.
Attn: Tax Department
500 Water Street
Jacksonville, Florida 32202-4420

FOR:
Shelby County Taxes Due

Account Number: 100896-1

| DESCRIPTION | AMOUNT |
|---|---|
| FOR USE TAX FOR THE PERIODS OF 11/07 THROUGH 4/08 | |
| ADD: ESTIMATED TAXES | 106,472.52 |
| LESS: TAXES PAID | (11,258.23) |
| TOTAL TAX DUE | 95,214.29 |
| ADD: 10% PENALTY | 9,521.43 |
| ADD: INTEREST | 2,508.27 |
| TOTAL DUE | $ 107,243.99 |

Make all checks payable to Shelby County Business Revenue
Payment is due within 30 days.
If you have any questions concerning this invoice, contact Patricia Ross, 669-3987

TAXPAYER NAME: CSI TRANSPORTATION INC

ACCOUNT # : 100996-1

SCHEDULE OF DELINQUENT TAXES FOR THE PERIODS OF 11/07 THROUGH 4/08

| PERIOD | ESTIMATED TAX DUE | TAX PAID | NET TAX DUE | PENALTY | INTEREST | TOTAL TAX DUE |
|---|---|---|---|---|---|---|
| Nov-07 | 17,745.42 | 598.06 | 17,147.36 | 1,714.74 | 857.37 | 19,719.46 |
| Dec-07 | 17,745.42 | 1,552.98 | 16,192.44 | 1,619.24 | 647.70 | 18,459.38 |
| Jan-08 | 17,745.42 | 987.40 | 16,758.02 | 1,675.80 | 502.74 | 18,936.56 |
| Feb-08 | 17,745.42 | 1,007.27 | 16,738.15 | 1,673.82 | 334.76 | 18,746.73 |
| Mar-08 | 17,745.42 | 1,175.44 | 16,569.98 | 1,657.00 | 165.70 | 18,392.68 |
| Apr-08 | 17,745.42 | 5,937.08 | 11,808.34 | 1,180.83 | 0.00 | 12,989.17 |
| TOTAL | 106,472.52 | 11,258.23 | 95,214.29 | 9,521.43 | 2,508.27 | 107,243.99 |
| | Calculation of estimated tax. | | 212,945.04/12= | 17,745.42 | | |

| | |
|---|---|
| Nov-06 | 19,038.19 |
| Dec-06 | 24,733.98 |
| Jan-07 | 12,665.77 |
| Feb-07 | 14,571.29 |
| Mar-07 | 21,316.55 |
| Apr-07 | 14,194.93 |
| May-07 | 14,767.84 |
| Jun-07 | 18,393.69 |
| Jul-00 | 15,617.31 |
| Aug-07 | 15,712.59 |
| Sep-07 | 23,626.74 |
| Oct-07 | 18,306.16 |
| | 212,945.04 |

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed: 2008 Jun-20]

---

Case No. CV-08-C-0655-S

---

CSX TRANSPORTATION, INC.,
*Plaintiff,*

v.

ALABAMA DEPARTMENT OF REVENUE and
TIM RUSSELL, Commissioner of the Alabama
Department of Revenue,
*Defendants.*

---

# STIPULATIONS FOR PURPOSES OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

---

The parties hereto, through undersigned counsel, agree to the following stipulations for use by the Court in connection with the plaintiff's Motion for Preliminary Injunction. Both parties reserve the right to submit further evidence to the Court through affidavits.

1. Plaintiff CSX Transportation, Inc. ("CSXT") is a Virginia corporation with its principal place of business located in Jacksonville, Florida. CSXT is engaged in interstate commerce as a common carrier by railroad. (Complaint, ¶ 5.)

2. The Alabama Department of Revenue ("Department") is the department of the State of Alabama charged with the responsibility to administer and collect taxes within Alabama, including the administration of sales and use taxes. (Complaint, ¶ 6.)

3. Defendant Tim Russell is the Commissioner of Revenue of the State of Alabama ("Commissioner"), and is named in this action in his official capacity only. As Commissioner, Mr. Russell exercises general supervision over administration of the assessment and taxation laws of Alabama, including those imposing sales and use taxes. (Complaint, ¶ 7.)

4. Generally, Alabama imposes sales tax on the gross receipts from the business of selling at retail or renting tangible personal property, or of furnishing entertainment. (Complaint, ¶ 8.)

5. The sales tax is collected by retailers, including operators of places of amusement, but is actually imposed on the consumer. *See Ala. Code* §40-23-26(c).

6. The Commissioner, acting through the Alabama Department of Revenue, collects and administers Alabama sales and use taxes. (Complaint, ¶ 12.)

7. Railroads are subject to sales or use tax on either their purchase or consumption or use of diesel fuel in this State. The tax is imposed by the State at the rate of 4%. (Complaint, ¶ 14).

8. Under Alabama law counties and municipalities may impose sales and use taxes which correspond to and parallel the sales and use tax imposed by the state. The rates imposed by the counties and municipalities are in addition to the 4% rate imposed by the State of Alabama. The counties and municipalities are required by state statute to conform their rules, regulations and procedures for the administration of sales and use taxes to the rules, regulations and procedures adopted by the Alabama Department of Revenue. Ala. Code §§11-3-11.2 and 11-51-200 through 204.

9. CSXT holds a direct pay permit issued by the Department. (Complaint, ¶ 15.)

10. The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property in interstate commerce ("motor carriers") and carriers of property in interstate commerce by ships, barges and other vessels ("water carriers"). Air carriers also are engaged in the transportation of property in interstate commerce in the State of Alabama, but only marginally compete with rail carriers due to the relatively small size and weight of the property transported by air carriers. (Complaint, ¶ 16.)

11. Water carriers are exempt from sales or use taxes on their purchase or consumption of diesel fuel in the State of Alabama used for interstate transportation. (Complaint, ¶ 18.)

12. Fuel costs incurred in the transportation of property in interstate commerce are a major annual operating expense of rail carriers, motor carriers and water carriers. (Complaint, ¶ 19.)

13. CSXT is a "common carrier by railroad" within the meaning of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501. (Complaint, ¶ 22.)

14. Motor carriers are not subject to sales and use taxes on their purchase or consumption of petroleum products used for on-road transportation purposes.

15. Ships and barges are not subject to any Alabama sales and use taxes on their purchase and consumption of petroleum products used for transportation purposes other than for intrastate transportation. (Complaint, ¶ 24.)

Respectfully submitted,

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# PETITIONER'S BRIEF

No. 09-520

Supreme Court, U.S.
FILED
AUG 1 .. 2010
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

As specified by the Court:

Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as "another tax that discriminates against a rail carrier."

## PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

## RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly held. No other publicly held company owns more than 10% of petitioner's stock.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) and its order denying hearing en banc (Pet. App. 39a) are unreported, as are the orders and opinion of the district court (Pet. App. 3a-12a). The controlling opinion of the court of appeals in *Norfolk Southern Railway* v. *Alabama Department of Revenue* is reported at 550 F.3d 1306 (Pet. App. 13a-38a).

## JURISDICTION

The court of appeals entered judgment on September 1, 2009. Pet. App. 1a. The petition for a writ of certiorari was timely filed on October 28, 2009. This Court granted certiorari on June 14, 2010, and has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"), provides, in relevant part:

> § 11501. Tax discrimination against rail transportation property.
>
> (a) In this section—
>
> (1) the term "assessment" means valuation for a property tax levied by a taxing district,
>
> (2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;
>
> (3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing trans-

portation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(a)-(b).

## STATEMENT OF THE CASE

### A. Statutory Background

1. Rail carriers were subject to discriminatory state and local taxation for decades prior to the 4-R Act's enactment in 1976. Congress surveyed the nature and impact of the discrimination in 1961. See S. Rep. No. 87 445, at 449-66 (1961). Congress later found that rail carriers were "'easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)). Congress quantified the impact of the discrimination to be "at least $50 million each year." H.R. Rep. No. 94-725, at 78 (1975); see also S. Rep. No. 91-630, at 1 (noting "long-standing burden on interstate commerce" created by discriminatory state taxation of railroads). Congress eventually concluded that the "temptation to excessively tax non-voting, nonresident businesses in order to subsidize general welfare services for state residents ... made federal legislation in this area necessary." *W. Air Lines*, 480 U.S. at 131.

2. Congress enacted such legislation as part of the 4-R Act. See Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act's purpose is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Id.* § 101(a), 90 Stat. at 33. Congress sought to "foster competition among all carriers by railroad and other modes of transportation," 45 U.S.C. § 801(b)(2), and in particular to prevent discriminatory state and local taxation of railroads.

Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, prohibits such tax discrimination, setting forth four forbidden tax schemes deemed to "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). The first three schemes concern property taxes. Subsection (b)(1) prohibits assessing railroad property value at a higher ratio to its true market value than the ratio of assessed value to true market value of "other commercial and industrial property." *Id.* § 11501(b)(1). Subsection (b)(2) prohibits levying a property tax based on such an assessment. *Id.* § 11501(b)(2). And subsection (b)(3) prohibits levying a property tax at a higher rate than the rate imposed on other "commercial and industrial property." *Id.* § 11501(b)(3). Those discriminatory practices were common prior to the 4-R Act. See S. Rep. No. 91-630, at 3.

Congress did not limit the reach of section 306 to those most obvious and blatant forms of existing tax discrimination. In subsection (b)(4), Congress also prohibited the States from "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." 49 U.S.C. § 11501(b)(4).[1] The

[1] Section 306 "was originally codified at 49 U.S.C. § 26c (1976 ed.). In 1978, Congress recodified section 306 at 49 U.S.C. § 11503 (1976 ed., Supp. II)." *CSX Transp., Inc.* v. *Ga. State Bd. of Equalization*, 552 U.S. 9, 13 n.1 (2007). The recodification "slightly altered" the statutory text, *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987), including the language now codified at § 11501(b)(4). As originally enacted in 1976, that provision prohibited the "imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad"; the amended text prohibits "*another tax* that discriminates against" a rail carrier. *Compare* Pub. L. No. 94-210, § 306(1)(d), 90 Stat. at 54, *with* Pub. L. No. 95-473, § 11503(b)(4), 92 Stat. 1337, 1446 (1978). The recodification and

provision came into being when Congress "realized near the end [of the legislative process] that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation," and "added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987). As one court described it, subsection (b)(4) "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

3. In *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), this Court held that subsection (b)(4) may not be invoked to challenge the imposition of a property tax on railroad property on the ground that certain non-railroad property is exempt from the tax. *Id.* at 339-48. The instant case presents the question whether imposing a generally applicable non-property tax (here, a sales and use tax) on rail carriers, while exempting railroad competitors (here, motor carriers and water carriers), is subject to challenge under subsection (b)(4). As shown below, the answer is yes.

### B. Proceedings Below

1. Petitioner CSX Transportation, Inc. ("CSXT") is a common carrier railroad engaged in interstate

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restatement "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. at 1466; *see Burlington N. R.R.*, 481 U.S. at 457 n.1. "Congress recodified [§ 306] again in 1995, without substantive change, this time as § 11501." *CSX Transp.*, 552 U.S. at 13 n.1. This brief will refer to the 4-R Act as currently codified, although it will note the original language of section 11501(b)(4) as an aid in construing that provision. *See* Sup. Ct. R. 34.5.

commerce. Pet. App. 7a. CSXT operates in Alabama, and is subject to taxation by Alabama and its subdivisions. *Ibid.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code § 40-23-26(c), and a use tax on the storage, use, or consumption of tangible personal property, *id.* § 40-23-60. The state sales and use tax, levied at a four percent rate, applies to the railroads' purchase, consumption, and use of diesel fuel in Alabama. Pet. App. 7a. Revenues from the state sales and use tax are deposited in the State's general revenue fund. *Ibid.* (citing Ala. Code § 40-23-35).

Alabama law permits counties and municipalities to impose additional sales and use taxes, which correspond to and parallel the sales and use tax imposed by the State itself. Pet. App. 7a; J.A. 43 ¶ 8; see Ala. Code §§ 11-3-11.2, 11-51-200 to -204. Alabama law requires counties and municipalities to conform their sales and use tax rules, regulations, and procedures to those adopted by the Alabama Department of Revenue. J.A. 43 ¶ 8; see Ala. Code §§ 11-3-11.2, 11-51-200 to -204. CSXT pays sales and use taxes on the purchase and use of diesel fuel to the Counties of Jefferson, Mobile, Montgomery, and Shelby, and to the municipalities of Birmingham, Mobile, and Montgomery. J.A. 36 ¶ 3.

The imposition of these county and municipal sales and use taxes results in CSXT paying in many areas more than the four percent state sales and use tax. CSXT's purchase and use of diesel fuel is subject to a combined state, county, and municipal sales and use tax rate of 8 or 9 percent in Birmingham (depending on whether the tax is applied in Jefferson or Shelby County), 9 percent in Mobile, and 10 percent in the City of Montgomery. J.A. 36 ¶ 4. Thus, for example,

if diesel fuel costs $3.00 per gallon, the effective sales and use tax rate on CSXT would be 30 cents per gallon in Montgomery and 27 cents per gallon in Mobile.[2] CSXT paid some $4.1 million in 2006, and $3.0 million in 2007, in state and local sales and use taxes on its purchase and use of diesel fuel in Alabama. Pet. App. 8a n.2.

The railroads' principal competitors in Alabama, motor carriers and water carriers, are exempt from state and local sales and use taxes on the purchase and consumption of diesel fuel. Pet. App. 7a-8a; J.A. 44 ¶¶ 10-15. Fuel used by motor carriers is subject instead to a fixed state motor fuel excise tax of 19 cents per gallon. Ala. Code §§ 40-17-2(1), 40-17-220(e). Under Alabama law, the proceeds from the motor fuel excise tax must be devoted to the construction, repair, and maintenance of public roads and bridges; to the costs of tax collection; and to pay the principal and interest on bonds previously issued to finance the building of roads. *Id.* §§ 40-17-13, 40-17-146, 40-17-222. Because motor carriers are subject to the excise tax and not to the sales and use taxes, their tax burden does not fluctuate depending on the price of fuel.

Water carriers benefit from an exemption from sales and use taxes for fuel used by vessels engaged in interstate or foreign commerce. Ala. Code §§ 40-23-4(a)(10), 40-23-62(12).[3] Fuel used by water

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[2] Eight days before CSXT filed this action, the average price of diesel fuel in the Gulf Coast states was $3.90.7 per gallon. *See Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, No. 2:08-cv-00285-HGD, 2008 WL 6515212, at *14 (N.D. Ala. Apr. 9, 2008), *aff'd*, 550 F.3d 1306 (11th Cir. 2008).

[3] Nearly all water carrier transport in Alabama is in interstate or foreign commerce. *See Norfolk S. Ry.*, 2008 WL

carriers in interstate or foreign commerce is not subject to the motor fuel excise tax either.

2. On April 14, 2008, CSXT filed this action in federal district court against respondent Alabama tax authorities ("Alabama"). J.A. 17-24.[4] The complaint alleged that the 4-R Act prohibits the State of Alabama, and counties and municipalities within Alabama, from imposing sales and use taxes on CSXT's purchase and consumption of diesel fuel because the exemptions granted to motor carriers and water carriers discriminate against CSXT within the meaning of § 11501(b)(4). J.A. 19-23.

On May 29, 2008, CSXT moved for a preliminary injunction to prohibit the imposition of those sales and use taxes on CSXT. J.A. 29-31. On July 8, 2008, the district court granted a preliminary injunction, which prohibited Alabama "and those in active concert and/or participation with them ... from assessing, levying, and/or collecting taxes on diesel fuel purchases and use by [CSXT]." Pet. App. 4a-5a. The court held that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, it follows that there is reasonable cause to believe that the [4-R] Act has been violated—i.e., the Alabama diesel fuel tax on railroads is discriminatory" under subsection (b)(4). *Id.* at 12a.

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6515212, at *14 ("Intrastate water carriage is a small percentage of the sales and use tax revenue in the State of Alabama, inasmuch as intrastate freight shipments by water make up only one million tons of the 194.3 million tons of intrastate shipments, or .5%.")

[4] Section 306(c) of the 4-R Act, now codified at 49 U.S.C. § 11501(c), "declared an exception from the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, allowing railroads to challenge discriminatory taxation in federal district courts." *Burlington N. R.R.*, 481 U.S. at 457-58.

The district court then stayed further proceedings pending the Eleventh Circuit's decision in *Norfolk Southern Railway* v. *Alabama Department of Revenue*, No. 08-12712, where another interstate rail carrier had challenged the same Alabama tax scheme on the same grounds as CSXT.

3. On December 11, 2008, the Eleventh Circuit issued its opinion in *Norfolk Southern*. 550 F.3d 1306 (11th Cir. 2008) (Pet. App. 13a-38a). The Eleventh Circuit rejected the railroad's challenge, ruling that a generally applicable non-property tax is not subject to challenge under subsection (b)(4) on the ground that railroad competitors, but not rail carriers, are exempt from such taxes. *Id.* at 1316 (Pet. App. 32a). Alabama had not advanced the proposition that the railroad's challenge was not even cognizable under subsection (b)(4), and neither party had briefed the issue.

The Eleventh Circuit rested its analysis on this Court's decision in *ACF Industries*. The court of appeals reasoned that "as a result of *ACF Industries*, while the 4-R Act prohibits the imposition of discriminatory property tax rates, the Act does not prevent a state from exempting other commercial entities from such taxes and leaving taxes on railroads in place, so long as the railroad is not targeted." *Id.* at 1314 (Pet. App. 29a). While acknowledging that the case involved "exemptions to a sales and use tax, rather than an ad valorem [property] tax," the court found the distinction inconsequential, explaining that "as with the ad valorem property taxes challenged in *ACF Industries*, there is nothing in the 4-R Act's plain language that indicates an intent to reach exemptions from generally applicable sales and use taxes. The language of section (b)(4) prohibits a discriminatory

'tax' not a discriminatory tax exemption." *Id.* at 1314-15 (Pet. App. 29a-30a).

The Eleventh Circuit acknowledged that other courts, disagreeing with its approach, have "scrutinized exceptions to generally applicable *non*-property taxes" under subsection (b)(4). *Id.* at 1315 & n.15 (Pet. App. 31a & n.15) (citing, *e.g.*, *Union Pac. R.R.* v. *Minn. Dep't of Revenue*, 507 F.3d 693, 695-96 (8th Cir. 2007); *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 985-86 (8th Cir. 1999); *Burlington N. R.R.* v. *Comm'r of Revenue*, 606 N.W.2d 54, 58-59 (Minn. 2000)). Rejecting these decisions, the Eleventh Circuit "join[ed] other courts that also have applied the *ACF Industries*' analysis to state and local taxes analogous to Alabama's sales and use tax on diesel fuel." *Id.* at 1315 & n.14 (Pet. App. 31a & n.14) (citing, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 78 F.3d 438, 442-44 (9th Cir. 1996)).

4. Less than a week after the Eleventh Circuit issued *Norfolk Southern*, the district court in this case vacated its preliminary injunction order and dismissed CSXT's complaint, based on the Eleventh Circuit's "dispositive" decision. Pet. App. 3a. CSXT appealed and, in light of *Norfolk Southern*, sought an initial hearing by the court en banc, which the Eleventh Circuit denied. *Id.* at 39a. Shortly thereafter, the panel affirmed the district court's judgment, recognizing that it was "bound" by *Norfolk Southern*. *Id.* at 2a.

## SUMMARY OF ARGUMENT

1. The Alabama tax scheme, which requires rail carriers to pay sales and use taxes on diesel fuel while exempting railroad competitors, is subject to challenge under § 11501(b)(4) as "another tax that discriminates against a rail carrier." The provision's

plain text prohibits any discriminatory tax not governed by § 11501(b)(1)-(3), including a tax that discriminates by exempting railroad competitors from an otherwise generally applicable non-property tax.

A. Section 11501 is as broad as it is clear: in addition to prohibiting specific discriminatory property tax schemes in subsections (b)(1)-(3), subsection (b)(4) provides that no State may impose "another tax that discriminates against a rail carrier." The statutory text does not restrict the types of discriminatory taxes covered by subsection (b)(4). Instead, it provides that all taxes, other than those governed by subsections (b)(1)-(3), are prohibited if they "discriminate[] against a rail carrier."

Consistent with this Court's precedents interpreting comparable statutory language, the term "another tax that discriminates against a rail carrier" should be implemented as written to encompass, as relevant here, discriminatory non-property taxation and exemption schemes. Nothing in subsection (b)(4), or in § 11501 as a whole, provides any support for the notion that Congress intended to shield from scrutiny under subsection (b)(4) non-property taxes alleged to be discriminatory because of exemptions granted to railroad competitors.

B. This interpretation of subsection (b)(4) is confirmed by the 4-R Act's purpose and history. Congress enacted the 4-R Act to promote the railroads' financial stability by, among other things, prohibiting discriminatory state and local tax schemes. Although the legislative process for many years focused on property taxation, which at the time was the most pervasive form of state tax discrimination against railroads, Congress ultimately determined that an additional "catch-all" provision was necessary to ensure that States and localities did

not frustrate the 4-R Act's purpose by imposing discriminatory non-property taxes. Rejecting a narrower form of subsection (b)(4) proposed in the House, which would have covered only "in lieu" taxes, Congress instead chose to enact the broader and more inclusive version that exists today. The Court should honor that choice by giving subsection (b)(4) the inclusive meaning it plainly was intended to convey.

II. Contrary to the Eleventh Circuit's view, nothing in this Court's decision in *ACF Industries* supports, let alone compels, a different conclusion. *ACF Industries* held that a property tax is not subject to challenge under subsection (b)(4) on the ground that some non-railroad property is exempt.

This holding is limited to exemptions from property taxes, and does not extend to exemptions from non-property taxes. The Court focused on Congress's choice in subsections (b)(1)-(3) to permit States to grant property tax exemptions to non-railroad property. It would be illogical, the Court concluded, for Congress to have permitted property tax exemptions for non-railroad property in subsections (b)(1)-(3), only to prohibit such exemptions in subsection (b)(4). This reasoning has no application to non-property taxes, for there is no indication—in § 11501 or elsewhere in the 4-R Act—that Congress intended to preserve the States' ability to impose non-property taxes on rail carriers while exempting railroad competitors from such taxes.

## ARGUMENT

### I. A NON-PROPERTY TAX IMPOSED ON RAILROADS IS SUBJECT TO CHALLENGE UNDER § 11501(b)(4) ON THE GROUND THAT THE TAX EXEMPTS RAILROAD COMPETITORS.

The plain text of § 11501(b)(4) permits a challenge to a State's imposition on a railroad of a generally applicable non-property tax from which railroad competitors are exempt. The statutory language, which prohibits "another tax that discriminates against a rail carrier," must be given its ordinary meaning—that any state or local tax that discriminates against railroads, and that is not governed by subsections (b)(1)-(3), is prohibited. The statutory purpose and history further confirm that Congress meant what it said in subsection (b)(4).

#### A. The Plain Text Of § 11501(b)(4) Permits Challenge To All Taxes That Discriminate Against Rail Carriers, Other Than Those Governed By § 11501(b)(1)-(3).

Section 11501(b) bars States and their subdivisions from imposing taxes that discriminate against railroads. See *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987). Subsections (b)(1)-(3) prohibit three specific modes of discrimination, all involving property taxes—assessing railroad property at a higher ratio to true market value than the ratio applicable to other commercial and industrial property in the same assessment jurisdiction, levying a tax on such improperly assessed property, and imposing a higher tax rate on railroad property than on other commercial and industrial property. See *id.* at 464. Four terms of art used in subsections (b)(1)-(3)—"assessment," "assess-

ment jurisdiction," "rail transportation property," and "commercial and industrial property"—are defined in subsection (a) of § 11501. 49 U.S.C. § 11501(a).

Subsection (b)(4) does not mention property taxes, does not use any of the property tax-related terms defined in subsection (a), and does not identify any specific modes of tax discrimination as prohibited. Rather, subsection (b)(4) prohibits "another tax that discriminates against a rail carrier"—or, as originally enacted, "any other tax which results in discriminatory treatment of" a rail carrier. *Id.* § 11501(b)(4); see page 4 n.1, *supra*. The meaning of the text is clear: other than taxes governed by subsections (b)(1)-(3), any other tax that discriminates against railroads falls within subsection (b)(4)'s broad scope. See *ACF Indus.*, 510 U.S. at 343.

The inclusive language of subsection (b)(4) should be implemented as written. "As with any question of statutory interpretation, [the Court's] analysis begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms." *Jimenez* v. *Quarterman*, 129 S. Ct. 681, 685 (2009) (citation omitted). Nothing in subsection (b)(4) precludes its application to generally applicable non-property taxes challenged on the ground that railroad competitors have been granted exemptions. To the contrary, Congress's use of the term "another tax" compels the conclusion that subsection (b)(4) permits challenges to *all* tax schemes, not already governed by subsections (b)(1)-(3), that are alleged to discriminate against railroads. See *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338, 345 (Iowa 1983) ("We see no uncertainty in the clear and unambiguous words 'any other tax.'").

When interpreting comparable statutes, this Court routinely has held that the term "any other"—which for purposes of subsection (b)(4) is synonymous with "another," see page 4 n.1, *supra*—carries a broad meaning. In *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008), for example, the Court held that the term "any other law enforcement officer" in 28 U.S.C. § 2680(c) means just what it says: *any* other law enforcement officer. The Court reasoned that "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." *Ali*, 552 U.S. at 220. The Court concluded that, "read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Id.* at 219 (alteration and internal quotation marks omitted).

In *United States* v. *Gonzales*, 520 U.S. 1 (1997), the Court considered the term "any other term of imprisonment" in 18 U.S.C. § 924(c)(1)(D)(ii). The Court held that because "Congress did not add any language limiting the breadth of that word ['any'], ... we must read § 924(c) as referring to *all* 'terms of imprisonment.'" *Gonzales*, 520 U.S. at 5 (emphasis added). Likewise, in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980), the Court held that the term "any other final action" in 42 U.S.C. § 7607(b)(1) "must be construed to mean exactly what it says, namely, any other final action." *Harrison*, 446 U.S. at 589 (emphasis omitted). The Court rejected a narrower interpretation, explaining that "[t]his expansive language offers no indication whatever that Congress intended [a] limiting construction." *Id.* at 588-89. *Accord, e.g.*, *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1871) (term "in any court" "includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending

to show that the words 'in any court' are not used in their ordinary sense"), *overruled on other grounds as recognized in Eisner* v. *Macomber*, 252 U.S. 189 (1920).

Consistent with these precedents, subsection (b)(4)'s reference to "another tax" or "any other tax" demands a broad construction because "Congress did not add any language limiting the breadth" of the provision. *Gonzales*, 520 U.S. at 5. Such is the considered judgment of the lower courts, which generally have held that allegedly discriminatory taxes, other than those governed by subsections (b)(1)-(3), are subject to challenge under subsection (b)(4). See *Richmond, Fredericksburg & Potomac R.R.* v. *Dep't of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) ("*RFP*") ("we conclude that subsection (d) was intended as a catchall provision designed to prevent discriminatory taxation of a railroad carrier by any means"); *Kan. City S. Ry.*, 817 F.2d at 374 ("We hold that § 11503(b)(4) forbids all forms of tax discrimination against railroads by states."); *Burlington N. R.R.*, 932 F.2d at 1186 ("Subsection (b)(4) is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax. It could be an income tax, a gross-receipts tax, a use tax, an occupation tax as in this case—whatever."); *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981) ("As noted in our review of the history of this section, its purpose was to prevent tax discrimination against railroads in any form whatsoever."); *S. Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) (the "broad language of the Act show[s] Congress possessed a general concern with discrimination in all of its guises").

Indeed, as the Eleventh Circuit explained three decades ago, long before its decision in *Norfolk Southern* and below:

> It would be difficult to imagine statutory language that would be less needful of construction than the "any other" language used here. Following three subparagraphs, (a), (b) and (c) [currently subsections (b)(1)-(3)] dealing with taxation of "transportation property," paragraph (d) [currently subsection (b)(4)] then forbids "the imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad." Without invoking any of the ordinary rules of construction, it would appear that paragraph (d) [subsection (b)(4)] is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means.

*Ala. Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

Because subsection (b)(4) prohibits "discriminatory taxation of a railroad carrier by any means," *id.*, it necessarily extends to suits challenging the imposition of a non-property tax on railroads that discriminates because railroad competitors are exempt from the tax. As this Court recognized in *ACF Industries*, tax exemptions "could be a variant of tax discrimination." 510 U.S. at 343. Indeed, this Court has long and routinely held that imposing a tax on certain taxpayers while exempting others is a form of discrimination that can be unlawful. See, *e.g.*, *Ark. Writers' Project* v. *Ragland*, 481 U.S. 221 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Minneapolis Star & Tribune Co.* v. *Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Speiser* v. *Randall*, 357 U.S. 513

(1958); *Walling* v. *Michigan*, 116 U.S. 446 (1886); see also *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 78 F.3d 438, 446 (9th Cir. 1996) (Nielsen, J., dissenting) (stating "the obvious point that a tax imposed on rail carriers, but not on motor carriers, is discriminatory in the most basic sense of the word—it treats those engaged in an identical activity differently").

Accordingly, CSXT's challenge to the Alabama tax scheme fits comfortably within the language of subsection (b)(4). The provision should be interpreted as written.

### B. The Statute's Purpose And History Confirm That The Text Means What It Says.

Because "[s]tatutory construction is a 'holistic endeavor,'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004), "the provisions of the whole law, and ... its object and policy," can be relevant when interpreting a statutory provision, *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) (internal quotation marks omitted). Although the plain language of subsection (b)(4) demonstrates that CSXT's challenge to the Alabama tax scheme is cognizable under that provision, the conclusion is reinforced by the 4-R Act's purpose and history.

Congress intended the 4-R Act to protect rail carriers "by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads." *ACF Indus.*, 510 U.S. at 336. Subsection (b)(4) plays an integral role in advancing that purpose. Although subsection (b)(4) was not introduced until several years after Congress undertook to consider what legislative action was necessary to prohibit the discriminatory taxation of railroads, Congress "realized near the end [of the process] that banning discriminatory property

taxes was not enough to save the railroads from unfair state taxation." *Kan. City S. Ry.*, 817 F.2d at 373. Congress "therefore added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Ibid.*

The House and the Senate proposed different versions of what ultimately became subsection (b)(4). The House version was narrowly drawn, prohibiting only "the imposition of a discriminatory 'in-lieu tax.'" S. Conf. Rep. No. 94-595, at 166 (1976); see also H.R. Rep. No. 94-725, at 77; *Burlington N. R.R.*, 932 F.2d at 1186 (explaining that the House's "reference" to an "in-lieu tax" meant "gross receipts taxes that a few of the states impose in lieu of property taxes") (internal quotation marks omitted). The conference rejected the House amendment in favor of the Senate version, which more inclusively prohibited "the imposition of *any other tax* which results in the discriminatory treatment of any common or contract carrier." S. Conf. Rep. No. 94-595, at 166 (emphasis added).

In keeping with the text Congress chose, "the 'any other tax' language in [subsection (b)(4)] is not limited to property taxes and other taxes imposed in lieu of the discriminatory property taxes prohibited by [subsections (b)(1)-(3)]." *RFP*, 762 F.2d at 379. As the Fourth Circuit explained:

> [T]he legislative history of the 4-R Act does not support a more limited construction of [subsection (b)(4)] because nothing in the committee reports, debates, or other legislative history focuses specifically on the purpose of [subsection (b)(4)]. It is entirely reasonable to conclude that the legislative history is silent as to the purpose of [subsection (b)(4)] because that subsection, inserted three weeks before the statute's passage, represented a last minute realization by

> Congress that prohibiting only discriminatory property taxes would not be enough relief.

*Id.* at 379-80 (footnote omitted).

As the statutory background makes clear, Congress recognized that an inclusive "catch-all" protection for railroads, extending beyond the particular variants of tax discrimination set forth in subsections (b)(1)-(3), was necessary to achieve the goal of protecting railroads from discriminatory taxation. See *Ala. Great S. R.R.*, 663 F.2d at 1040 (subsection (b)(4) "is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means"). It would subvert the congressional plan to conclude that subsection (b)(4) does not even speak to circumstances where States or their subdivisions disadvantage railroads by exempting railroad competitors from generally applicable non-property taxes imposed on railroads. See S. Rep. No. 91-630, at 6 (noting that States, in an "ominous trend," were considering shifting from reliance on discriminatory property assessments to the use of other means of "perpetuating tax discrimination").

The point is illustrated by *Burlington Northern, Santa Fe Railway* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999), which invalidated under subsection (b)(4) a Missouri scheme that imposed a generally applicable sales and use tax on the railroads' purchase and use of diesel fuel while exempting trucks and barges, the railroads' major competitors. *Id.* at 985. To immunize that tax scheme from challenge, as the Eleventh Circuit has done, would place the railroads "at a competitive disadvantage that would defeat the purpose of the statute—financial stability." *Id.* at 986. At the same time, the Eleventh Circuit's interpretation would permit a subsection (b)(4) challenge to a lesser form of discrimination—for instance,

imposing a four percent sales and use tax on the railroads, and a two percent sales and use tax on trucks and barges. There is no basis in the text, history, or structure of § 11501 for, and it is inconceivable that Congress intended, such a result.

To be sure, there remains the question whether a particular non-property tax scheme actually violates § 11501(b)(4) because it exempts railroad competitors. What constitutes unlawful "discrimination" is an issue for another day.[5] What is clear is that the Congress that enacted subsection (b)(4) did not intend to categorically immunize a state non-property tax scheme from scrutiny simply because it uses exemptions rather than rate differentials as its chosen method of disadvantaging railroads. As the United States put it in urging this Court to grant certiorari:

> The text, structure, and history of the 4-R Act support [CSXT's] view that a tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under 49 U.S.C. 11501(b)(4). On its face, Subsection (b)(4) reaches beyond property taxes to forbid "another tax"—here, a sales or use tax—"that discriminates against a rail carrier."

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[6] Having held the Alabama tax scheme not subject to challenge under subsection (b)(4), the Eleventh Circuit found it unnecessary to ascertain the "appropriate 'comparison class'" against which the discrimination claim should be measured. *Norfolk S.*, 550 F.3d at 1308 n.3 (Pet. App. 16a n.3); *see Burlington N., Santa Fe Ry.*, 193 F.3d at 986 ("the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case"). In this case, as the railroad and Alabama agreed in *Norfolk Southern*, railroad competitors comprise the appropriate "comparison class." 550 F.3d at 1308 n.3 (Pet. App. 15a n.3).

> A rail carrier's showing that it pays a tax, while competitors do not, is a proper basis for challenging the tax under Subsection (b)(4).

U.S. Br. in Support of Cert. 14.

## II. *ACF INDUSTRIES* DOES NOT REQUIRE A DIFFERENT RESULT.

This Court held in *ACF Industries* that generally applicable property taxes that apply to railroads, but that exempt some other property within the State, are not subject to challenge under subsection (b)(4). 510 U.S. at 339-48. That holding does not apply in the non-property tax context, particularly where the exemption benefits railroad competitors, thereby placing rail carriers at a competitive disadvantage. The limited scope of *ACF Industries* is apparent from the Court's summary of its holding: "We conclude that § [11501], which expresses Congress' resolution of the matter, does not limit the States' discretion to exempt nonrailroad property, but not railroad property, from ad valorem property taxes of general application." *Id.* at 347-48.

In *Norfolk Southern* and the decision below, the Eleventh Circuit construed *ACF Industries* as foreclosing a challenge not only to property tax and exemption schemes, but also to non-property tax and exemption schemes, including those that benefit railroad competitors. 550 F.3d at 1313-16 (Pet. App. 26a-32a); Pet. App. 2a. The Eleventh Circuit's ruling misinterprets *ACF Industries* and, in so doing, improperly curtails the protection Congress intended to provide railroads under subsection (b)(4).

The plaintiff in *ACF Industries* claimed that Oregon violated subsection (b)(4) "by imposing an ad valorem tax upon railroad property while exempting various other, but not all, classes of commercial and

industrial property." 510 U.S. at 335. To decide whether the claim was cognizable under subsection (b)(4), this Court examined the interplay between that provision and subsections (b)(1)-(3), which focus exclusively on discriminatory property taxes.

The Court first addressed subsections (b)(1) (3). *Id.* at 340-43. As noted above, those provisions prohibit a State from imposing a property tax rate or assessment ratio on railroads that exceeds the rate or assessment ratio applied to other "commercial and industrial property." 49 U.S.C. § 11501(b)(1), (3). The term "commercial and industrial property," in turn, means "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*." *Id.* § 11501(a)(4) (emphasis added). It follows, the Court reasoned, that a railroad may challenge a tax rate or assessment ratio under subsections (b)(1)-(3) as exceeding the rate or assessment ratio applied to other "'commercial and industrial property'" only if that other property was actually "'subject to a property tax levy.'" 510 U.S. at 341-42. Because property exempted from taxation is not "'subject to a property tax levy,'" the Court concluded that "railroads may not challenge property tax exemptions under" subsections (b)(1)-(3). *Id.* at 342.

That conclusion, the Court explained, impacts the scope of subsection (b)(4). Recognizing that it "must pay heed to the fact that Congress placed exempt property beyond the reach of subsections (b)(1)-(3)," the Court held that it "would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." *Id.* at 343. Accordingly, the Court

ruled that "[t]he structure of § [11501] ... warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property." *Ibid.*

*ACF Industries* does not govern in the non-property tax context. The Court's holding that property tax exemptions are immune from scrutiny under subsection (b)(4) rests entirely on the conclusion that such exemptions are "beyond the reach of subsections (b)(1)-(3)." *Ibid.* That conclusion, in turn, rests entirely on the fact that the comparison class in subsections (b)(1)-(3)—other "'commercial and industrial property'"—excludes exempt property. *Id.* at 341-42. Congress's intent to immunize exemptions from scrutiny is unique to property taxes, and has no bearing whatsoever on non-property taxes like the sales and use taxes here. Because subsections (b)(1)-(3) do not address non-property tax exemptions, interpreting subsection (b)(4) to reach such exemptions, far from "subvert[ing] the statutory plan," *id.* at 340, instead would implement the provision's ordinary meaning.

Advancing the contrary view, the Eleventh Circuit stated that "nothing in the 4-R Act's plain language ... indicates an intent to reach exemptions from generally applicable sales and use taxes. The language of section (b)(4) prohibits a discriminatory 'tax' not a discriminatory tax exemption." 550 F.3d at 1314-15 (Pet. App. 29a). That rationale is incorrect. As this Court made clear in *ACF Industries*, exempting some taxpayers, but not others, from taxation "could be a variant of tax discrimination." 510 U.S. at 343. Subsection (b)(4)'s broad prohibition on tax discrimination thus extends to taxes that discriminate by exempting railroad competitors from

generally applicable non-property taxes. Any other rule would allow States to favor local, non-railroad carriers at the expense of rail carriers in a way that jeopardizes the financial health of the latter, which is the one outcome Congress unquestionably meant to prevent.

The Eleventh Circuit next stated that "the Supreme Court did not limit its conclusion—that the 4-R Act 'does not speak with any degree of particularity to the question of tax exemptions'—to ad valorem property taxes; its conclusion therefore has direct application to the issue presented here." 550 F.3d at 1315 (Pet. App. 29a-30a). This conclusion is equally meritless. In *ACF Industries*, this Court left no doubt that its focus was on exemptions from property taxes, not exemptions from other taxes. The Court described its own holding as follows: "a State may grant exemptions *from a generally applicable ad valorem property tax* without subjecting the taxation of railroad property to challenge" under subsection (b)(4). 510 U.S. at 335 (emphasis added). The Court emphasized that the statutory definition of "'commercial and industrial *property*'" directly "b[ore] on the case before [it]." *Id.* at 342 (emphasis added). And, the Court explained that its decision rested on the fact that Congress had "allowed the States to grant *property tax exemptions* in subsections (b)(1)-(3)." *Id.* at 343 (emphasis added). Nothing in the Court's opinion suggests any rationale for the notion that *non-property* tax exemptions were encompassed within its holding.

Indeed, in reversing the Eleventh Circuit in another § 11501 case three years ago, this Court confirmed its understanding that *ACF Industries* addressed only property tax exemptions:

> [*ACF Industries*] concerned ... the command in § 11501(b)(4) preventing a State from "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation" in the taxing jurisdiction. This bar on facially discriminatory taxes, we held, did not prevent a State from exempting certain nonrailroad property from otherwise generally applicable ad valorem taxes. At the time the 4-R Act was adopted, a majority of States exempted one or more classes of business property from ad valorem taxation, "including business inventories, raw materials used in textile manufacturing, ... and mechanics tools," to name just a few. The States had provided such property tax exemptions for years. In the face of this widespread and historical practice, we declined to read the 4-R Act to prohibit a type of tax exemption the text did not expressly mention.

*CSX Transp., Inc.* v. *Ga. State Bd. of Equalization*, 552 U.S. 9, 21 (2007) (citations omitted; omission in original) (quoting *ACF Indus.*, 510 U.S. at 343, 344). Thus, properly understood in context, *ACF Industries* does not interpret the 4-R Act broadly to grant the States' unlimited authority to discriminate against railroads so long as they limit their efforts to exemptions. The case is strictly limited to property tax exemptions, the only type of exemption permitted by subsections (b)(1)-(3).

The Eleventh Circuit next suggested that "as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted." 550 F.3d at 1315 (Pet. App. 30a). From this premise, the Eleventh Circuit concluded that "concerns for state sovereignty" raised a presumption that "Congress' silence [as to non-property tax

exemptions] reflects a determination to leave such exemptions in place." *Ibid.* (Pet. App. 30a-31a). This analysis turns *ACF Industries* on its head. *ACF Industries* ruled that despite subsection (b)(4)'s prohibition on "another tax that discriminates against rail carriers," the provision could not extend to challenges based on property tax exemptions because subsection (b)(1)-(3) reflected Congress's decision to protect property tax exemptions from scrutiny. And if the provisions that more directly address property taxation permit the exemption of non-railroad property, then "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." 510 U.S. at 343.

The Court's conclusion in *ACF Industries* rests not on Congress's "silence" regarding property tax exemptions, see 550 F.3d at 1315 (Pet. App. 30a), but rather on the notion that subsections (b)(1)-(3) spoke to and affirmatively permitted such exemptions. That reasoning has no application here, as subsections (b)(1)-(3) do not address, much less permit, *non*-property tax exemptions. And even if the Eleventh Circuit is correct that non-property tax exemptions were common when the 4-R Act was enacted in 1976, the undeniable fact remains that exemptions have long been recognized as a form of tax discrimination. See pages 17-18, *supra* (citing cases). Accordingly, the plain language of subsection (b)(4), which straightforwardly prohibits "another tax that discriminates against a rail carrier," governs the discriminatory use of non-property tax exemptions, without interference from subsections (b)(1)-(3).

Finally, the Eleventh Circuit invoked federalism, stating that "concerns for state sovereignty are just

as keen" in the non-property tax context as *ACF Industries* found they were in the property tax context. 550 F.3d at 1315 (Pet. App. 31a). Again, the court of appeals misinterpreted *ACF Industries*. Federalism supported this Court's decision to shield property tax exemptions from scrutiny under subsection (b)(4) because other portions of the statute, subsections (b)(1)-(3), expressed Congress's decision to permit such exemptions. *ACF Indus.*, 510 U.S. 339-43. Given that clear legislative choice, the Court noted that federalism concerns made it "hesitant to extend the statute beyond its evident scope." *Id.* at 345.

Here, by contrast, nothing in the text or structure of § 11501 raises even the slightest inference that Congress sought to shield non-property tax exemptions from scrutiny. Instead, as shown above, Congress enacted a provision that plainly encompasses discriminatory non-property tax and exemption schemes. See Section I, *supra*. Accordingly, even if non-property tax exemptions implicate "important questions of state policy, ... judicial scrutiny of" tax schemes like Alabama's "is authorized by the 4-R Act's clear command." *CSX Transp.*, 552 U.S. at 20-21.

## CONCLUSION

The judgment of the court of appeals should be reversed, and the cause should be remanded for consideration on the merits of whether the Alabama tax scheme violates subsection (b)(4).

Respectfully submitted,

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# RESPONDENT'S BRIEF

Supreme Court, U.S.
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No. 09-520

# In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,
*Petitioner,*
v.
ALABAMA DEPARTMENT OF REVENUE, AND
CYNTHIA UNDERWOOD, ASST. REVENUE COMMISSIONER,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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## STATUTORY PROVISIONS INVOLVED

This case involves §306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (the "4-R Act"). The State refers to all versions and drafts of this section by its current codification: 49 U.S.C. §11501. The State reproduces §11501 in its entirety, *infra* at 1a-3a.

Section 11501 is an exception to the Tax Injunction Act, 28 U.S.C. §1341, which provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

## INTRODUCTION

The 1961 Doyle Report revealed that States commonly taxed railroad and pipeline property at a proportionately higher level than other taxpayers' property. To end this discriminatory practice, the railroads proposed legislation that would force States to place interstate carriers on equal tax footing with local commercial and industrial taxpayers. After 15 years of debate and refinement, Congress passed §11501.

In *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the Court held that as long as a State's property tax is "generally

applicable"—*i.e.*, as long as the State taxes railroads proportionately to other taxpayers—the State may exempt various properties from the tax without subjecting it to challenge under §11501(b)(4), which proscribes "another tax that discriminates against a rail carrier." *Id.* at 340. Several considerations compelled the Court's decision, including the facts that "the statute does not speak with any particularity to the question of tax exemptions" and "[does] not provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* at 343.

Congress did not re-write §11501 after the Court's decision. Consequently, the statute still makes no mention of tax exemptions and still provides no standard for determining whether an exemption discriminates against a rail carrier.

Nevertheless, Petitioner CSX Transportation claims that Alabama's generally applicable *sales and use* taxes are subject to challenge under §11501(b)(4) based on two exemptions. In other words, CSX argues that the phrase "another tax that discriminates against a rail carrier" means one thing when property taxes are challenged under §11501(b)(4) and something entirely different when sales and use taxes are challenged. Stranger still, CSX's argument results in §11501 providing its *narrowest* protection when dealing with claims of property tax discrimination, the one type of discrimination expressly mentioned in the statute and the one that Congress spent 15 years trying to eradicate.

The Eleventh Circuit avoided these structural oddities by holding that the granting exemptions from a generally applicable tax, of any kind, does not violate §11501. The court of appeals was correct. Its decision should be affirmed.

## STATEMENT OF THE CASE

Alabama imposes distinct excise taxes on diesel fuel based on the fuel's usage: 4% "sales and use" excise taxes for off-road usage and a 19¢ per gallon "motor fuels" excise tax for on-road usage. Because trains operate off-road, CSX pays the 4% sales and use excise taxes on its purchase or consumption of diesel fuel, just like any other non-exempt business or citizen who uses diesel fuel off-road.

CSX argues that Alabama's 4% sales and use taxes are "another tax that discriminates against a rail carrier" under §11501(b)(4) because two of CSX's competitors do not pay sales and use taxes on their purchases of diesel fuel. Specifically, motor carriers are exempted from paying sales and use taxes because they instead pay the motor fuels tax. Interstate water carriers do not pay either excise tax based on an exemption that predates the 4-R Act by nearly two decades.

We detail Alabama's excise tax structure in more detail *infra* at 12-16. But we begin with §11501.

## A. Section 11501: History and Text

1. *The Doyle Report*: The 1961 Doyle Report named 31 States that significantly overtaxed the property of interstate carriers in comparison to other taxpayers' property. *See* S. Rep. No. 87-445, at 487 (1961) (hereinafter "Doyle Report"). Railroads and pipelines were especially targeted. The Report proposed alternative solutions.

Under one proposal, Congress would prohibit States from levying ad valorem property taxes on railroads' and pipelines' rights-of-way. *See id.* at 463-65. The stated purpose of this complete prohibition was to "equalize competitive opportunities for our Nation's transportations carriers" by eliminating ad valorem taxes paid by railroads and pipelines (who owned their rights-of-way) but not their competitors (who used public rights-of-way). *Id.* at 463.

Alternatively, the Association of American Railroads ("AAR") proposed an "antidiscriminatory tax law" that would prohibit States from assessing the property of an "interstate common carrier" at a higher ratio to true market value than other property in the State. *Id.* at 465. This proposal protected "all common carriers engaged in interstate commerce" against discrimination *vis-à-vis* the general mass of taxpayers by "ensur[ing] that such carriers would receive equal treatment with other taxpayers subject to the same tax rates." *Id.* at 466. Unlike the first option, the States could still tax the interstate carriers "so as long such carriers [were]

accorded equal tax treatment with other taxpayers." *Id.*

Congress chose the second option.

2. *Equal Treatment:* Congress debated various drafts of §11501 for the next 15 years. All the while, the railroads maintained that §11501 was designed to place interstate carriers as a group on equal footing with the general mass of other taxpayers, not to grant railroads or any other interstate carrier preferential treatment. For example, AAR President Stephen Ailes told Congress, "In seeking an end to discriminatory taxes, railroads and other carriers are not looking for favoritism; rather we are only seeking fairness. We believe we should be assessed at the same rate as other taxpayers." *Transp. Act of 1972: Hearings on H.R. 11824, H.R. 11826, and H.R. 11207 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 356 (1972) (hereinafter 1972 Hearings).

Standing alongside the railroads throughout the process were their interstate competitors, as §11501 was drafted to benefit them as well. For example, the American Trucking Association ("ATA") argued in favor of §11501 during the final hearings before the House and Senate in 1975, the year after subsection (b)(4) was added. *See Railroads—1975 (Part 4): Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 94th Cong. 1166, 1178 (1975) (hereinafter 1975 Senate Hearings) (statement of Peter Beardsley, Vice

President and General Counsel of the ATA); *Railroad Revitalization, Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 618, 621 (1975) (hereinafter 1975 House Hearings) (same).

3. *The States' Fight for Exemptions:* The AAR's original proposal was limited to what became §§11501(b)(1) and 11501(b)(2)—*i.e.*, the overvaluation provisions. Doyle Report at 465. The comparison class in the AAR's proposal was restricted to property "subject to the same property tax levy"—*i.e.* taxed property. *Id.* Thus, the early drafts of §11501 "did not provide that granting full property tax exemptions was discriminatory." Joseph A. Laronge, *Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 Willamette L. Rev. 635, 640 (1990).

That changed (temporarily) in 1967, when the Senate added what is now §11501(b)(3), the higher tax rate provision. *Discriminatory Taxation of Common Carriers, 1967: Hearings on S. 927 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 90th Cong. 1-2 (1967) (hereinafter 1967 Hearings). The new subsection contained a broader comparison class than its predecessors: "any other property in the taxing district"—*i.e.*, taxed *and* untaxed property. *Id.* at 2. The States recognized that "[f]ully exempt property . . . was unlawful under [subsection (b)(3)] because it was part of the comparison class of 'any other property.'" Laronge, *supra*, 641.

Consequently, the States waged an eight-year campaign to alter §11501 in a way that ensured tax exemptions could not be deemed discriminatory. *See* Laronge, *supra*, 641-42 (listing four examples of the State's "complaints" that varying drafts of §11501 "would make granting full property tax exemptions unlawful"); *Dep't of Rev. v. ACF Industries*, No. 92-74, U.S. Br. 20 n.24 (listing three examples of "lobbying by the States to avoid consideration of exempt property" under §11501).

The States prevailed when the Committee on Conference chose language that confined the comparison class for the entire statute to property "subject to a tax levy." *See* Laronge, *supra*, 644 (crediting the narrow class to "suggested amendments" made on behalf of the States); *ACF Industries*, *supra*, U.S. Br. 20 n.24 (crediting the narrowed class as Congress' "response to lobbying by the States").

4. *Subsection (b)(4)*: At least twice during the legislative process, the AAR noted that several States did not impose ad valorem property taxes, "but rather [imposed] in lieu taxes frequently measured by gross receipts." Doyle Report at 487; *see also Common and Contract Carrier State Property Tax Discrimination: Hearings on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, and S. 2289 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 96 (1970) (hereinafter 1970 hearings).

The House first introduced subsection (b)(4)'s prohibition on "any other tax which results in discriminatory treatment of a carrier" in March 1974. *Surface Transp. Legislation: Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694, and S. 1149 Before the Subcomm. on Transp. And Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 93rd Cong. 24 (1974) (hereinafter 1974 Hearings). The House Committee on Interstate Commerce labeled subsection (b)(4)'s target the "so-called 'in-lieu tax'," H.R. Rep. No. 94-725, at 77 (1975), and stated its belief that "discriminatory property and 'in lieu' taxation should be ended." *Id.* at 78.

Railroad representatives asked the Senate to add the same provision the next year. After reciting subsections (b)(1)-(3), AAR President Stephen Ailes asked the Senate to add "a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions." 1975 Senate Hearings at 1837. On behalf of the New York Dock Railway, Stuart Johnson then read the House's version of the "any other tax" provision and asked the Senate to add it to protect his railway from New York's gross receipts tax. *Id.* at 1883. The Senate subsequently adopted the House's "any other tax" provision and extended it to all interstate carriers. *See* S. Rep. No. 94-499, at 232 (1975) (containing the text of S. 2718).

5. *Passage*: Both Chambers approved the Conference Committee's report on the 4-R Act, which provided §11501(b)(4)'s coverage for all common

carriers. *See* 121 Cong. Rec. 41967 (1975) (House); *id.* at 42209 (Senate); H.R. Rep. No. 94-768, at 24 (1975) (Conf. Rep.) (containing §11501(b) as proposed by the Conference Committee). But to avoid a "certain" Presidential veto on matters unrelated to §11501, Congress vacated its passage of the 4-R Act and recommitted it to the Conference Committee. 122 Cong. Rec. 281-82 (1976) (passing H. Con. Res. 527). When the Act returned from the Conference Committee, the beneficiaries of §11501 had changed from all interstate carriers to just interstate rail carriers. *See* S. Rep. No. 94-595, at 27 (1976) (Conf. Rep.); *see also* H.R. Rep. No. 94-781, at 812, 851 (1976) (Conf. Rep.). The lone mention of the change in the Committee's Report was that "[t]he conference substitute . . . limited the provision to taxation of railroad property." *Id.* at 166. Both Chambers passed the new version after brief debates that did not mention a change in the scope of §11501(b)(4). *See* 122 Cong. Rec. 1334-44 (1976) (Senate); *id.* at 1350-60 (House).

6. *The Text*: Section 11501 embodies Congress' effort to protect railroads from tax discrimination as compared to the general mass of local businesses.[1] Section 11501(b) provides:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority

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[1] Section 11501 has been rephrased and recodified several times without substantive change. *See* U.S. Br. 2 n.1 (citing the changes). We refer to §11501's current text unless otherwise stated. *See* Sup. Ct. R. 34.5.

> acting for a State or subdivision of a State may not do any of them:

49 U.S.C. §11501(b). The four subsections that follow prohibit state taxes that "unreasonably burden and discriminate against interstate commerce."

The first three subsections prohibit States from (1) assessing railroad property at a higher ratio to true market value, (2) levying a tax based on such an assessment, and (3) imposing a higher tax rate on railroad property, all in comparison to other "commercial and industrial property." 49 U.S.C. §11501(b)(1)-(3).

Section 11501(a)(4) provides the definition of "commercial and industrial property:"

> (4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

49 U.S.C. § 11501(a)(4). Thus, the comparison class for subsections (b)(1)-(3) is the general mass of taxed properties. Property that is not "subject to a property tax levy" (*i.e.* exempt property) is excluded from the class.

Subsection (b)(4), which is the focus of this case, declares that the final act that "unreasonably

burden[s] and discriminate[s] against interstate commerce" is the "impos[ition of] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board under this part." 49 U.S.C. §11501(b)(4).

### B. The *ACF Industries* Opinion

In *ACF Industries*, the Carlines claimed that Oregon's generally applicable ad valorem property tax violated §11501(b)(4) because Oregon exempted various classes of property. 510 U.S. at 335. The Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)." *Id.* at 340.

Textually, the Court renounced a reading of §11501(b)(4) "in isolation," and stated that "[t]he structure of [§11501] as a whole" must be reviewed to construe subsection (b)(4) properly. 510 U.S. at 339-40. The Court then keyed on §11501(a)(4)'s restriction of the comparison class for violations of subsections (b)(1)-(3) to property "subject to a property tax levy" (*i.e.*, "taxed property"), *id.* at 340-43, the restriction the States successfully lobbied Congress to secure. *See supra* 6-7. The Court held that it would be "illogical" to conclude that Congress would shield property tax exemptions from challenge under subsections (b)(1)-(3), then "turn around and nullify its own choice in subsection (b)(4)." 510 U.S. at 343.

The Court next noted that "[o]ther considerations reinforce our construction of the statute." *Id.* First, §11501 "does not speak with any degree of particularity to the question of tax exemptions" and "[does] not provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* Second, "[g]iven the prevalence of property tax exemptions when Congress enacted the 4-R Act, [§11501's] silence on the subject . . . reflects a determination to permit the States to leave their exemptions in place." *Id.* at 344. Third, "[p]rinciples of federalism support, in fact, compel, [the Court's] view" because the Carlines could not show that prohibiting exemptions was "the clear and manifest purpose of Congress." *Id.* at 345 (internal quotation marks and citations omitted). Finally, legislative history supported the Court's conclusion that property tax exemptions were not subject to challenge in that the Carlines were unable to cite "a single instance in the 15-year legislative history of the 4-R Act in which representatives of the railroad industry expressed concern about discriminatory property tax exemptions." *Id.* at 346. Instead, the legislative history revealed assurances from three Congressmen that property tax exemptions would not be prohibited. *Id.* at 345.

### C. Alabama's Dual Excise Taxes On Diesel Fuel

Title 40 of the Alabama Code contains two excise taxes: the "sales and use" tax (Chapter 23) and the "motor fuels" tax (Chapter 17). For more than 70 years, Alabama has taxed diesel fuel under these distinct provisions based upon the fuel's usage:

on-road or off-road. This differentiation is largely predicated on federal law.

1. *The On-Road/Off-Road Dichotomy*: The Hayden-Cartwright Act of 1934 forced States to choose between (a) expending revenues from highway-related taxes "for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith" or (b) losing a share of their "Federal aid for highway construction." 23 U.S.C. §126(a) (1964). In response, every State adopted a motor fuels tax to be "used only for the state's highway program." Ross D. Netherton, *Intergovernmental Relations Under the Federal-Aid Highway Program*, 1968 Urb. Law 15, 28; *see also* Jerry L. Marshall, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1, 8 (1973) ("Urged on by the Hayden-Cartwright Amendment of 1934 . . . all states have, by custom, statute or constitution, pledged highway user taxes to highway construction.").

By the time §11501 took effect in 1979, every State levied a distinct motor fuels tax for on-road usage. Netherton, *supra*, 28. To prevent double-taxation, 43 States exempted "[g]asoline and, in most, but not all, cases, other motor fuels subject to the motor fuels tax" from the State's sales tax. John F. Due & John L. Mikesell, *Sales Taxation: State and Local Structure and Administration* 77 (1983) (surveying the States in 1979-80).

Congress repealed the 1934 Hayden-Cartwright Act. *See* IRS Restructuring & Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998). Still, federal law perpetuates the tax distinction between on-road and off-road usage of diesel fuel. The United States levies a 24.3¢ per gallon excise tax on diesel fuel used on highways, 26 U.S.C. §4081(a)(2)(A)(iii), and requires that diesel fuel designated for off-road usage, and thus exempt from the federal tax, be "indelibly dyed" for identification purposes. 26 U.S.C. §4082(a)(2). Today, all 50 States have a distinct motor fuels excise tax. *See* Federation of Tax Administrators, *State Motor Fuel Tax Rates*, *available at* http://www.taxadmin.org/fta/rate/mf.pdf (charting the Jan. 1, 2010 motor fuels tax rates for all 50 States) (last visited Sept. 27, 2010).

2. *Alabama's Sales and Use Taxes (Off-Road Diesel)*: Chapter 23 imposes a 4% excise tax on the sale, storage, use, or consumption of tangible goods. *See* Ala. Code §§40-23-2(1) (sales tax), 40-23-61(a) (use tax). The 4% rate applies to a business' purchase of hardware, supplies, or diesel fuel, just as it applies to a citizen's purchase of groceries, clothing, or diesel fuel. The proceeds of the sales and use taxes are deposited into Alabama's Education Trust Fund, which primarily funds Alabama's public schools. *See* Ala. Code §§40-23-35, 40-23-85.

Chapter 23 grants an exemption for fuel used by water vessels engaged in interstate or foreign, but not intrastate, commerce. *See* Ala. Code §40-23-4(a)(10) (exemption from sales tax); §40-23-62(12)

(exemption from use tax). Because railroads and intrastate water carriers are not exempt, they pay the State's general 4% sales and use taxes on their purchase or consumption of diesel fuel. Motor carriers are exempted from paying sales and use taxes because they instead pay the motor fuels tax described below.

3. *Alabama's Motor Fuels Tax (On-Road Diesel)*: For diesel fuel used on roads or highways, Chapter 17 imposes two excise taxes totaling 19¢ per gallon. *See* Ala. Code §§ 40-17-2(1) (13¢ per gallon), 40-17-220(c) (6¢ per gallon). To avoid double-taxation, payment of the motor fuels excise tax exempts the taxpayer from additionally paying the general 4% sales and use excise taxes. Ala. Code §40-17-2(1). Accordingly, motor carriers pay only the 19¢ motor fuels tax. [2] Diesel fuel that is marked for off-road usage pursuant to 26 U.S.C. §4082 is exempt from paying Alabama's motor fuels excise tax. Ala. Code §§40-17-2(1), 40-17-220(c). Consequently, railroads and barges are exempt from paying the 19¢ motor fuels excise tax.

4. *Summary of Alabama's Excise Taxes*: The chart on the following page reflects the excise tax

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[2] While it is unlawful to use diesel fuel marked for off-road usage on roads and highways without paying Chapter 17's motor fuels excise tax, Ala. Code §40-17-22, it is lawful to purchase unmarked (on-road) diesel fuel for use off-road. Thus, if rail carriers wanted to avoid the alleged "discrimination" *vis-à-vis* motor carriers, a rail carrier could purchase unmarked diesel fuel and pay the State's 19¢ motor fuels excise tax, thereby exempting themselves from the State's 4% sales and use taxes.

imposed by the State on a gallon of diesel fuel if diesel fuel cost $3.00 per gallon[3]:

| Taxpayer | State Tax |
|---|---|
| Businesses Using Diesel On-Road | 19¢ |
| Motor Carriers (Interstate and Intrastate) | 19¢ |
| Businesses Using Diesel Off-Road | 12¢ |
| Railroads (Interstate and Intrastate) | 12¢ |
| Intrastate Water Carriers | 12¢ |
| Interstate Water Carriers | 0¢ |

## D. The Proceedings Below

1. *The Complaint*: CSX sued the Alabama Department of Revenue and its Commissioner ("the

[3] Diesel fuel retailed at $2.959 per gallon in the Gulf States in August 2010. *See* U.S. Energy Administration Information, *Weekly Retail Gasoline and Diesel Prices*, *available at* http://www.eia.doe.gov/oil_gas/petroleum/info_glance/petroleum.html (last visited Sept. 27, 2010).

State") in federal district court, claiming that the State's sales and use taxes violate §11501(b)(4) because neither motor carriers nor interstate water carriers pay the tax on their purchase or consumption of diesel fuel.[4] J.A. 17-24 (Complaint). CSX asked the court to enjoin the State from assessing, levying, or collecting its sale-and-use tax from CSX. J.A. 23. The district court granted CSX's motion for a preliminary injunction, Pet. App. 4a-5a, and the State's motion to stay further proceedings pending the Eleventh Circuit's opinion in *Norfolk Southern Railway v. Alabama Department of Revenue*, No. 08-12712, an interlocutory appeal from the denial of a preliminary injunction on the same claim that CSX raised. Docket No. 19.

2. *The Norfolk Southern Opinion*: The Eleventh Circuit concluded that this Court's opinion in *ACF Industries* was "equally applicable" to claims challenging non-property taxes and thus "guide[d the] decision." Pet. App. 29a. Applying *ACF Industries*, the court determined that an exemption from Alabama's sales and use taxes "does not offend the 4-R Act so long as the tax is generally applicable and does not target railroads within Alabama," *id.* at 32a. The court held that the taxes "qualif[y] as generally applicable, and thus [do] not discriminate against railroads in violation of the 4-R Act." *Id.* Accordingly, the court affirmed the denial of Norfolk's motion for preliminary injunction because the railroad "would not succeed on the merits of its case." *Id.* at 37a-38a.

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[4] No counties or municipalities are parties to this proceeding. *See* Blue Br. ii.

3. *CSX's Appeal*: Based on the *Norfolk Southern* decision, the district court in this case dissolved its preliminary injunction and dismissed CSX's suit. *Id.* at 3a. The Eleventh Circuit denied CSX's request for initial hearing en banc, *id.* at 39a, and a panel of the court affirmed the district court's dismissal on the authority of *Norfolk Southern*. *Id.* at 1a-2a.

## SUMMARY OF THE ARGUMENT

Every factor that lead to this Court's decision in *ACF Industries* that property tax exemptions are not subject to challenge under §11501(b)(4) applies with full force to sales and use tax exemptions.

1. *Text and Structure*: To avoid *ACF Industries*, CSX argues that the Court should cabin its review solely to subsection (b)(4) because CSX challenges a non-property tax, and the remaining portion of the statute speaks only to property taxes. But as the Court noted in *ACF Industries*, subsection (b)(4)—like any subsection of a statute—should not be read "in isolation," it must be read against "the structure of [§11501] as a whole." 510 U.S. at 339-40.

The structure of §11501 "as a whole" provides a singular definition of discrimination: Imposing a proportionately heavier tax burden on interstate rail carriers than on the general mass of commercial and industrial taxpayers. We know this for two reasons. First, the failure to place rail carriers on equal footing with the general mass of taxpayers is the discriminatory characteristic shared by subsections

(b)(1)-(b)(3), to which subsection (b)(4) is structurally bound. Second, the opening clause of §11501(b) specifies that the state taxes prohibited by subsections (b)(1)-(4) "unduly burden and discriminate against interstate commerce." This confirms that the objective of the provision is to protect interstate rail carriers against discrimination *vis-à-vis* local businesses—not individual interstate competitors.

Generally applicable taxes do not "discriminate" against interstate rail carriers under §11501(b) because they place rail carriers on equal footing with the general mass of other taxpayers. Exemptions from a generally applicable tax likewise do not discriminate against rail carriers under §11501 because (a) rail carriers are taxed proportionately with others who pay the tax and (b) Congress removed exempt property from the comparison class in §11501(a)(4), thereby expressing its intent to prevent exemptions from being considered discriminatory. And exemptions granted to one of an interstate rail carriers' *interstate* competitors (as is the case here) certainly do not "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. §11501(b).

Reading subsection (b)(4) to allow challenges to sales and use taxes based on an exemption to one of the railroad's competitors, while barring the same claim if the railroad challenged a property tax, would result in two structural oddities. First, §11501(b) would provide its narrowest protection against discriminatory property taxes, the only type of taxes

mentioned in §11501 and the type that Congress spent 15 years drafting §11501 to proscribe. Second, the comparison class for discrimination would be upended: for property taxes, it would be the general mass of commercial and industrial taxpayers, *see* 49 U.S.C. §11501(a)(4), while for non-property taxes, the class would solely be competing interstate carriers. Nothing in §11501's text supports either of these results.

2. *Other Considerations*: Just as they did in *ACF Industries*, three additional considerations back our structural analysis. First, Congress failed to provide standards in §11501 for distinguishing valid from invalid exemption schemes, thereby implying that Congress did not deem tax exemptions to be discriminatory. Second, sales and use tax exemptions were just as prevalent as property tax exemptions during the period in which §11501 was considered and passed—yet Congress never expressed a desire to proscribe them throughout the statute's 15-year legislative history.

Third, in *ACF Industries*, the Court held that "principles of federalism . . . compel[led]" its view that property tax exemptions were not subject to challenge under §11501 because neither the statute's text nor its legislative history revealed that it was Congress' "clear and manifest purpose" to subject exemptions to challenge. *Id.* Congress has not re-written §11501(b)(4) since the Court's decision, nor has history been altered. Thus, §11501's text and legislative history still "[do] not speak with any degree of particularity to the question of tax

exemptions." 510 U.S. at 343. Consequently, the "principles of federalism" that compelled a ruling for the State in *ACF Industries* compel the same result here.

3. *Legislative History*: Section 11501's legislative history reveals that generally applicable state taxes were the *goal* of §11501. The railroads proposed §11501 to end the common practice of taxing interstate carrier property at a proportionately higher rate than local property. For 15 years, the railroads assured that, as long as States placed interstate carriers on equal tax footing with local taxpayers, §11501 would not prohibit the States from taxing railroads as they saw fit. As the final product reveals, Congress took the railroads at their word.

Congress was also responsive to the States, who lobbied to protect their ability to grant tax exemptions. Congress' removal of exempt property from §11501(a)(4)'s comparison class was a direct result of the States' efforts, and as the Court noted in *ACF Industries*, Members of Congress assured the States—in no uncertain terms—that §11501 would not prohibit tax exemptions. 510 U.S. at 345-46.

## ARGUMENT

The Court has been down this road before. In *ACF Industries*, the Carlines argued that §11501(b)(4) is "a residual category designed to reach any discriminatory state tax," and because property tax exemptions "fall outside the scope of subsections (b)(1)-(3), they are within the ambit of subsection (b)(4)." 510 U.S. at 339. The Court found this

argument to be "defensible if subsection (b)(4) is read in isolation," *id.*, but rejected the Carlines' argument after viewing "the structure of [§11501] as a whole," and in light of several other considerations. *Id.* at 340-47.

CSX dusts off the Carlines' failed argument and sets it on a new target: sales and use taxes. Like the Carlines, CSX argues that "the plain text of §11501(b)(4) permits challenge to all taxes that discriminate against rail carriers, other than those governed by §11501(b)(1)-(3)." Blue Br. 13. Like the Carlines, CSX asks the Court to read §11501(b)(4)'s text with blinders, Blue Br. 24-28, despite the Court having stated in *ACF Industries* that "we must look elsewhere to determine its meaning." 510 U.S. at 340. And, like the Carlines, CSX fails to cite "a single instance" in §11501's 15-year legislative history in which Congress or the railroads "expressed concern about discriminatory tax exemptions." *Id.* at 345-46.

CSX adds a new twist, however. CSX argues that an exemption for an interstate competitor constitutes "discrimination" under §11501(b)(4). This argument is directly at odds with the railroads' and the United States' agreement in *ACF Industries* that discrimination only occurs under §11501(b)(4) if the State fails to place railroads on equal tax footing with *the general mass of taxpayers*:

- *United States*: "The object of the statute is not to obtain for rail carriers the most preferential tax treatment available. It is to

> obtain for rail carriers equivalent treatment with the general mass of other taxpayers." *ACF Industries*, Case No. 92-74, U.S. Br. 28.

- *AAR*: "Section [11501] protects railroads from excessive and unfair state taxation by tying their fate to that of local taxpayers." *ACF Industries*, *supra*, Br. of Amicus AAR 26.

- *The Carlines*: "Our position on the proper interpretation of the term discrimination or discriminatory treatment has been . . . once the State exempts more than 50 percent of other business' personal property, other commercial and industrial property, then you have discrimination that is *per se* invalid under (b)(4) . . . ." *ACF Industries*, *supra*, Oral Argument Tr. 36.

In other words, there was universal agreement that §11501 ensures only that railroads are treated as equals when it comes to property taxes. But CSX now argues that §11501 makes them the States' "most-favored-taxpayers" when it comes to *non-property* taxes because they are entitled to every tax benefit given another carrier.

The Court should reject CSX's argument by reading §11501(b)(4)'s text consistently for property and non-property taxes: Generally applicable state taxes, of any kind, do not "discriminate" based on exemptions. To hold otherwise would lead to the bizarre result that Congress spent 15 years refining its prohibition on discriminatory property taxes, only

to draw that prohibition more narrowly than subsection (b)(4)'s prohibition on discriminatory sales and use taxes—a topic Congress never discussed when drafting the statute.

## I. The Text and Structure of §11501 Establish that Generally Applicable Sales and Use Taxes Do Not "Discriminate Against a Rail Carrier" in Violation of §11501(b)(4).

Subsection (b)(4) prohibits "another tax that discriminates against a rail carrier." CSX argues at length that "another tax," and its predecessor "any other tax," mean any other conceivable tax. Blue Br. 13-18. Of course, we know that not *every* state tax that grants an exemption is challengeable under §11501(b)(4) because the Court rejected the same "any means any" argument in *ACF Industries* when it held that generally applicable property taxes are not challengeable based on exemptions. 510 U.S. at 340. As the Court stated in *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004), "'any' can and does mean different things depending upon the setting."

That said, CSX's "any means any" argument misses the bigger picture. Proving that sales and use taxes are encompassed by the phrase "another tax" is irrelevant if the tax does not "discriminate against a rail carrier" as that phrase is defined by §11501(b). Thus, the key to understanding why exemptions from a generally applicable tax are not prohibited by §11501(b) lies in the definition of "discriminate."

"Discriminate" is an inherently ambiguous term. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J., announcing the judgment of the Court) ("The concept of 'discrimination', like the phrase 'equal protection of the laws,' is susceptible of varying interpretations . . . .") But the text and structure of §11501 clarify its meaning in subsection (b)(4).

### A. "Discrimination" Under §11501(b) Is Limited to the Imposition of a Proportionately Heavier Tax on Interstate Rail Carriers than on the General Mass of Commercial and Industrial Taxpayers.

Subsection (b)(4)'s phrase "discriminates against a rail carrier" gains its meaning from the rest of §11501. As the Court stated in *ACF Industries*, subsection (b)(4) cannot be properly understood "in isolation," but must be interpreted in light of "the structure of [§11501] as a whole." 510 U.S. at 339-40; *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* §46:05 (6th ed. 2000) ("A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same subject matter.")

The proper starting point is §11501(b)'s opening clause:

> (b) *The following acts unreasonably burden and discriminate against interstate commerce,*

> and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

49 U.S.C. §11501(b) (emphasis added). As emphasized, §11501(b) binds its four subsections together by declaring that each prohibits an act that "discriminates" in the same manner: by "discriminat[ing] against interstate commerce." The Court confirmed this connection when it noted in *ACF Industries* that "[t]he interplay between subsections (b)(1)-(3) and the definition of 'commercial and industrial property' in subsection (a)(4) is central to the interpretation of subsection (b)(4)." 510 U.S. at 340.

That subsection (b)(4) is inextricably linked to its more specific predecessors is further supported by *ejusdem generis*, the canon of construction that provides "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[5] *Circuit City Stores, Inc., v. Adams*, 532 U.S.

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[5] *Ejusdem generis* literally means "of the same kind." Singer, *supra*, §47:17 at 272. So does the word "another." *See, e.g.*, New Oxford American Dictionary 65 (3d ed. 2010) (primary definition: "used to refer to an additional person or thing of the same type as one already mentioned or known about"); Random House Webster's Unabridged Dictionary 85 (2d ed. 2001) (primary definition: "being one more or more of the same"); Webster's Third International Dictionary 89 (1976) (second definition: "being one more in addition to one or a number of the same kind."). Thus, the phrase "another tax that discriminates"

105, 114-15 (2001) (quoting Singer, *supra*, §47:17). In fact, the Court applied the canon in *Circuit City* to limit a general phrase that began, as subsection (b)(4) originally did (J.A. 25), with the words "any other." *Id.* at 114 (confining the phrase "any other class of workers engaged in foreign or interstate commerce" to "transportation workers" based on its specific examples of "seamen" and "railroad employees").

The question, then, is what characteristic is shared by subsections (b)(1)-(b)(3) that helps define discrimination in subsection (b)(4). As detailed below, there are two. First, each subsection prohibits the imposition of a proportionately heavier tax burden on interstate rail carriers than the general mass of commercial and industrial taxpayers. Second, each demonstrates Congress' intent to protect interstate businesses from discrimination *vis-à-vis* local businesses. CSX's argument cannot be reconciled with either structural feature.

1. *Proportionately Heavier Taxation*: Subsections (b)(1) and (b)(2) forbid States from assessing a rail carrier's property at a higher percentage to fair market value than the assessed value of other "commercial and industrial property" in the State, and from levying a tax based on such assessment. Subsection (b)(3) forbids States from subjecting interstate rail carrier property to a higher tax rate than the rate applied to other "commercial and

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further supports application of *ejusdem generis* to define discrimination consistently among §11501(b)'s subsections.

industrial property" in the State. *See also* 49 U.S.C. §§11501(a)(4) (defining "commercial and industrial property"); 11501(c) (requiring courts to determine the "true market value of all other commercial and industrial property").

Subsections (b)(1)-(b)(3) thus share a common characteristic: A State "discriminates" against an interstate rail carrier by forcing the carrier to pay a proportionately heavier tax than the general mass of commercial and industrial taxpayers in the State. Conversely, if the rail carrier is taxed proportionately with other businesses in the State—*i.e.*, if the rail carrier is paying a generally applicable tax—then no discrimination has occurred.

Because "discriminate" under subsection (b)(4) gains it meaning by reference to subsections (b)(1)-(b)(3), "another tax that discriminates" under §11501(b)(4) means a state tax that forces interstate rail carriers to pay a proportionately heavier tax than the general mass of commercial and industrial taxpayers. Judge Posner has read §11501(b) similarly:

> The preceding subsections of the statute [(b)(1)-(b)(3)] . . . forbid states to tax railroad property proportionately more heavily than other commercial and industrial property . . . . By analogy, we may assume that a tax is 'discriminatory' within the meaning of the fourth subsection if it imposes a proportionately heavier tax on railroading than on other activities . . . .

*Burlington N. R.R. Co. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991) (Posner, J.). So, too, did the United States in *ACF Industries*:

> The object of the statute is not to obtain for rail carriers the most preferential tax treatment available. It is to obtain for rail carriers *equivalent treatment with the general mass of other taxpayers.*

*ACF Industries, supra*, U.S. Br. 28 (emphasis added).

Once "discriminate against a rail carrier" is properly defined, it becomes clear that generally applicable taxes do not "discriminate" under §11501(b)(4) because, by definition, they impose the same proportional tax burden on all taxpayers. This is true even if certain businesses are exempt because the railroads are still taxed at the same proportionate rate as the *general mass* of other taxpayers, which is determined by a "random-sampling method," 49 U.S.C. §11501(c), not a one-on-one comparison with any particular business (including the railroads' competitors).

2. *Protection from Local Businesses*: The text of §11501, and a contemporaneous statute, also demonstrate that Congress tied interstate rail carriers' tax fate to the general mass of commercial and industrial businesses in the State to protect interstate carriers against discrimination *vis-à-vis* local businesses.

Again, §11501(b) only prohibits "acts [that] unreasonably burden and discriminate against *interstate commerce*." (emphasis added). When Congress passed the 4-R Act, §11501(b)'s prohibition clause read a little differently; it proscribed acts that "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." J.A. 25 Nearly identical language existed in then-§13(4) of the Interstate Commerce Act, which we reproduce *infra* at 4a-5a.

Section 13(4) granted the Interstate Commerce Commission the authority to proscribe *intra*state passenger fares otherwise set by States "when intrastate revenues fall short of producing their fair proportionate share of required total revenues, [and thus] work an undue discrimination against interstate commerce." *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Illinois*, 355 U.S. 300, 306 (1958). Section 13(4) allowed the ICC to "remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce." *Id.* In other words, §13(4) granted the ICC with the limited power to equalize the playing field between interstate and intrastate business—just as Congress granted courts limited authority to level the playing field between interstate rail carriers and the general mass of businesses in the State in §11501(c). *See infra* 37-39 (discussing §11501(c)'s remedial provision).

The similarities between then-§13(4) and §11501(b) are no coincidence. Congress borrowed the language when writing §11501. *See* S. Rep. No. 90-

1483, at 8-9 (1968); 1969 Hearings at 11; 1967 Hearings at 9, 25. That Congress transplanted §13(4)'s language regarding discrimination against interstate commerce into §11501 shows that Congress intended the provisions to proscribe the same problem: instances where States treat interstate businesses more harshly than local taxpayers.

As the AAR aptly stated in *ACF Industries*, "Section [11501] protects railroads from excessive and unfair state taxation *by tying their fate to that of local taxpayers*." *ACF Industries*, *supra*, Br. of Amicus AAR 26 (emphasis added). CSX's argument that §11501 is instead concerned with granting rail carriers with every tax benefit given their interstate competitors is irreconcilable with §11501's text and structure. Furthermore, CSX's argument strips §11501(b)'s phrase "discriminate against interstate commerce" of its natural meaning: "A State may not impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995). Giving an exemption to one interstate carrier, and not another interstate carrier, in no way "unduly burden[s] and discriminate[s] against interstate commerce," 49 U.S.C. §11501(b), in favor of local business.

* * *

In a nutshell, CSX argues that §11501 embodies two different statutes. The first, §11501(b)(1)-(b)(3),

is a well-defined, narrowly-tailored property tax statute that does nothing more than place rail carriers on equal footing with the general mass of commercial and industrial businesses. The second statute, §11501(b)(4), is an undefined, and thus infinitely broad, prohibition on non-property taxes that ensures that interstate rail carriers are placed on equal or better tax footing than any other carrier doing business in the State. As shown below, nothing in §11501(b)'s text supports a bipolar statute.

### B. Nothing in §11501(b)(4)'s Text or Structure Supports a Different Definition of Discrimination for Sales and Use Taxes than It Does for Property Taxes.

CSX argues that, outside of §11501(b)(4), no part of §11501 matters when a rail carrier is challenging a non-property tax because everything else deals only with property taxes. Blue Br. 24. If CSX is correct, then subsection (b)(4)'s phrase "another tax that discriminates" takes on entirely different meanings depending on the type of tax being considered: property or non-property. But nothing in §11501's plain text suggests, much less mandates, morphing definitions.

In *Clark v. Martinez*, 543 U.S. 371 (2005), the Court rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases," *id.* at 386, deeming the call "[t]o give the same words a different meaning . . . would

be to invent a statute rather than interpret one." *Id.* at 378. But inventing a chameleon statute is precisely what CSX desires: A statute that allows challenges to sales and use tax exemptions, while it precludes challenges to property tax exemptions.

The Court has previously applied the consistent-interpretation principle when interpreting §11501(b). In *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, the Court rejected an attempt to add an intent requirement to §11501(b) based on the type of tax practice being challenged:

> The Court of Appeals does not dispute that the other acts prohibited by the plain language of [§11501(b)], such as the use of facially discriminatory disparities in assessment ratio or the systematic undervaluation of other commercial and industrial property, are not subject to an intent requirement. *It does not explain how the same sentence can be interpreted in two such strikingly different senses depending upon whether the railroad's challenge is to the State's undervaluation of other commercial and industrial property or to the State's overvaluation of railroad property.*

481 U.S. 454, 463-64 (1987) (emphasis added). *Burlington Northern* teaches that §11501(b) should not be read in "strikingly different senses" depending on the state tax practice being challenged. *Id.* CSX points to nothing in §11501's plain language that upsets that principle when the challenged practice is the granting of tax exemptions.

In fact, the textual hurdle CSX faces is made even more insuperable by two additional considerations. First, as discussed in Part II.C, *infra*, taxation is a traditional state power that, if Congress wishes to preempt, "it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks and citations omitted). CSX cannot satisfy this burden because it fails to point to any statutory language that clearly and unmistakably proves Congress intended to treat property tax exemptions and non-property tax exemptions differently.

Second, CSX cannot provide any conceivable explanation for why Congress focused squarely on discriminatory state property taxes for 15 years, then consciously chose to target property taxes more *narrowly* than any other type of tax—particularly a type of tax (sales and use) it never mentioned.

## II. *ACF*'s Other Considerations Compel The Conclusion That Exemptions from Generally Applicable Sales and Use Taxes Are Not Subject to Challenge Under §11501(b)(4).

Three "other considerations reinforce[d the Court's] construction of the statute" in *ACF Industries*: (1) the lack of a standard for judging exemption schemes, (2) Congress' silence despite the prevalence of property tax exemptions, and (3) principles of federalism. *ACF Industries*, 510

U.S. at 343-45. Each is fully applicable here, and each compels the same result as it did before.

### A. Congress Failed To Provide a Standard or Remedy for Invalid Exemption Schemes.

1. *Lack of a Standard.* Despite providing great detail on how to judge the legality of ad valorem property taxes, Congress failed to "provide a standard for courts to distinguish valid from invalid exemption schemes." *Id.* at 343. As the Court recognized in *ACF Industries*, the logical implication is that Congress provided no standard for distinguishing between valid and invalid exemption schemes because Congress did not deem exemptions to be discriminatory. *Id.*

If applied to both property and non-property taxes, *ACF Industries'* bright-line rule eliminates any confusion that would arise because Congress provided no standard: (1) If a state tax is generally applicable, then it cannot be challenged as discriminatory, but (2) if a state tax singles out interstate rail carriers, then the tax might be discriminatory. 510 U.S. at 340, 346-47.

Confusion only arises if §11501(b)(4) mandates a different rule for non-property taxes, a rule nowhere to be found in §11501's text. As the United States correctly notes, a ruling that exemptions from a generally applicable non-property tax may violate §11501(b)(4) would saddle lower courts with a host of

new questions. U.S. Br. 25-26. Here are some examples:

- What is the proper comparison class: the general mass of commercial and industrial taxpayers or individual direct competitors?

- If the class is the general mass of commercial and industrial taxpayers, what percentage of businesses must be exempted before the tax is deemed discriminatory: 25%, 50%, 75%?

- If the class is direct competitors, who is a "direct" competitor? Do courts apply a mathematical formula to decide?

- If a rail carrier has more than one direct competitor, how many competitors must be exempted before discrimination occurs: 25%, 50%, 75%, or just one?

- Are exemptions discriminatory *per se* or can the States justify the exemptions?

- If exemptions may be justified, can courts look to other parts of the State's tax code to notice complimentary taxes paid by the comparison class?

These questions need not be answered because courts should apply *ACF Industries*' simple rule to all challenges brought against tax exemptions under §11501(b)(4). That said, should the Court reach opposite conclusions in this case and *ACF Industries*,

these are just a handful of questions that might cause struggles in the lower courts.

2. *Lack of a Remedy*: Once the lower courts settle on a standard, a new problem emerges: §11501 provides no remedy for discriminatory tax exemptions.

Section 11501(c) greatly restricts federal courts' jurisdiction to enjoin state taxes:

> Relief may be granted under this subsection [*i.e.* subsection (b)] *only if* the ratio of assessed value of rail transportation property exceeds by at least five percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. §11501(c) (emphasis added). Applying the provision's text against the background of the Tax Injunction Act, federal courts can only enjoin States from overvaluing railroad property, or undervaluing other businesses' property, under subsections (b)(1)-(b)(2). Federal courts have no power to enjoin the granting of tax exemptions as a violation of subsection (b)(4), or, apparently, *any* violation of subsection (b)(4). The United States acknowledged this textual limitation in *ACF Industries*. *ACF Industries*, *supra*, U.S. Br. 26 ("[t]he statute could be read to permit injunctive relief in federal courts only for violations of the 'equal assessment ratio' requirements of subsections (b)(1) and (b)(2)").

If Congress intended to prohibit States from granting excise tax exemptions under subsection (b)(4), then Congress should not have left such a gaping hole in the remedial provision. Congress should have provided courts with instructions on how to differentiate between valid and invalid exemptions, as well as guidance on how to remedy the invalid ones. And these instructions should have been "unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460, just like the instructions Congress provided for judging assessment value ratios in §11501(c).

Granted, Congress' preclusion of a federal remedy for violations of subsection (b)(4) could be the result of poor draftsmanship. But any Congressional shortcomings must bow in the State's favor, given that §11501(c) was drafted as a narrow exception to the Tax Injunction Act, which otherwise bars federal courts from enjoining state taxes. *See Tully v. Griffin*, 429 U.S. 68, 73 (1976) ("the [TIA] has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations").

Even if the Court looks beyond §11501(c)'s text to its legislative history, CSX gets no relief. When drafting §11501(c), Congress rejected DOJ's advice to empower federal courts with the authority to strike down a state tax "in its entirety" because Congress felt "[s]uch a provision could cause economic hardship and inconvenience upon States and localities." S. Rep. No. 91-630, at 13 (1969). Instead, as the United States recognized in *ACF Industries*,

"Congress authorized injunctive relief under the 4-R Act only from 'the excessive portion of a State or local transportation property tax.'" *ACF Industries*, *supra*, U.S. Br. 26 (quoting S. Rep. No. 91-630, at 11); *see also infra* 37-39. When a state tax is generally applicable, there is no "excessive portion" to enjoin.

Again, in *ACF Industries*, the Court inferred that Congress' failure to provide standards for distinguishing valid from invalid exemption schemes reflected Congress' judgment that tax exemptions are not subject to challenge under §11501. 510 U.S. at 343. The Court should reach the same conclusion regarding Congress' failure to provide a remedy for a 'discriminatory' tax exemption.[6]

### B. Given the Prevalence of Sales and Use Tax Exemptions When §11501 Was Passed, Congress' Silence on the Issue Reflects Its Decision That Such Exemptions Were Not Discriminatory.

Sales tax exemptions are as old as the sales tax itself. *See, e.g.*, Robert Haig & Carl Shoup, *The Sales Tax in the American States* 638-44 (1934) (outlining various sales tax exemptions of the 1930's); Due & Mikesell, *supra*, 50-82 (listing numerous sales tax exemptions of the late 1970's). The court of appeals

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[6] Not only does §11501(c)'s lack of a remedy for a generally applicable tax shed light on the meaning of discrimination under §11501(b), it serves as an independent basis for affirmance. If CSX's claim does not entitle it to relief, then the district correct correctly dismissed the claim summarily. Tellingly, CSX omits the provision from its recitation of the statute. Blue Br. 1-2.

cited several sources containing historical sales tax exemptions, which we will not duplicate here. Pet. App. 30a (citing five books and articles listing pre-1976 sales and use tax exemptions). Instead, we focus specifically on exemptions for motor fuel purchases.

By the 1950's, "the most prolific source of exemptions from sales and use taxes [lay] in the field of interstate commerce ... [due to] the constitutional limitations against burdening or interfering with the flow of commerce between the States." George D. Brabson, *Analysis of Sales and Use Tax Exemptions—with Comment as to More Uniform Applications*, 3 Vand. L. Rev. 294, 300 (1956). Relevant here, "[a]t one time barges in navigable waters were considered exempt from state taxation of fuel by virtue of the Commerce Clause." *Atchison, Topeka, & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983) (citing *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929)). While we admittedly cannot link the two together, we know that Alabama's exemption for interstate (but not intrastate) water carriers' purchase of diesel fuel dates back to at least 1959—nearly two decades before the 4-R Act was passed. *See* Ala. Act No. 1959-99 (amending Ala. Code 1940 Tit. 51, §789).

We are certain why motor carriers receive their sales and use tax exemption, however. As outlined in our statement of the case, *supra* at 13-14, Congress essentially forced the States to adopt a distinct motor fuels excise tax with the passage of the Hayden-Cartwright Act of 1934. By the time the

4-R Act became effective in 1979, all 50 States had adopted a motor fuels tax for on-road usage of motor fuels, Netherton, *supra*, 28, and 43 States granted an exemption from sales and use taxes to payers of the motor fuels tax to prevent double-taxation. Due & Mikesell, *supra*, 77.

Congress surely knew that sales and use exemptions existed when it passed the 4-R Act, including exemptions on the purchase or consumption of diesel fuel. Accordingly, the Court's statement regarding the prevalence of property tax exemptions in *ACF Industries* holds just as true in this case:

> Given the prevalence of [sales and use] tax exemptions when Congress enacted the 4-R Act, [§11501's] silence on the subject—in light of the explicit prohibition of tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place.

*ACF Industries*, 510 U.S. at 344.

### C. Principles of Federalism Again Compel a Limited Reading of §11501(b)(4).

One passage from *ACF Industries* provides CSX with an insurmountable obstacle: "The statute does not speak with any degree of particularity to the question of tax exemptions. Subsection (b)(4) . . . is, at best, vague on the point." *ACF Industries*, 510 U.S. at 343.

Taxation is a traditional state power, *id.* at 345, which in this case provides the lifeblood of Alabama's public school system. For Congress to pre-empt a traditional state power, "it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. Put another way, "[the Court] must be *absolutely certain* that Congress intended" to preempt a State's ability to grant exemptions from its sales and use taxes. *Id.* at 464 (emphasis added).

Absolute certainty is a high hurdle, one that even the broadest of terms, including "any," often cannot clear. For example, under 47 U.S.C. §253, States cannot inhibit "the ability of *any entity* to provide any interstate or intrastate telecommunications services." (emphasis added). Applying the clear-statement rule, the Court has held that the term "any entity" in §253 does not encompass a State's political subdivisions because the term "is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." *Nixon*, 541 U.S. at 140-41.

The Court invoked the clear-statement rule in *ACF Industries*: "We will interpret a statute to pre-empt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.'" *ACF Industries*, 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Earlier in the opinion, the Court acknowledged that

- "[t]he scope of subsection (b)(4) . . . is not as clear" as the scope of subsections (b)(1)-(3), *id.* at 337;

- "the statute does not speak with any degree of particularity to the question of tax exemptions," and "subsection (b)(4) . . . is, at best vague on the point" *id.* at 343; and,

- "Congress did not state whether exemptions are a form of forbidden discrimination against rail carriers, and further did not provide a standard for courts to distinguish valid from invalidation exemption schemes." *Id.* at 343-44.

In light of these facts, the Court held that "[p]rinciples of federalism support, in fact *compel*, our view" that §11501(b)(4) does not prohibit property tax exemptions. *Id.* at 345 (emphasis added).

The Court recently confirmed that *ACF Industries* rested in large part on the clear-statement rule. *See CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 21-22 (2007). In rejecting Georgia's argument that "[federal] court review of state valuation methodologies is not authorized by a clear statement in the [4-R] Act," *id.* at 21, the Court distinguished its invocation of the clear-statement rule in *ACF Industries*: "The States had provided such property tax exemptions for years. In the face of this widespread and historical practice, we

declined to read the 4-R Act to prohibit a type of tax exemption the text did not expressly mention." *Id.*

Congress has remained silent in the 16 years since the Court decided *ACF Industries*. Consequently, §11501's text still does not "expressly mention" a prohibition on tax exemptions, property or non-property. *Id.* History, of course, also remains unchanged: Congress realized in 1976 that States granted tax exemptions. *See supra* at 39-41. Thus, it is unsurprising that CSX, the United States, and the remaining *amici* have failed to cite a single instance of Congress expressing its intent to prohibit sales and use tax exemptions.

Accordingly, the same principles of federalism that compelled the Court to adopt a limited reading of §11501(b)(4) in *ACF Industries* compel the same limited reading in this case: §11501 does not "prohibit a type of tax exemption the text [does] not expressly mention." *CSX Transp.*, *supra*, 21.

## III. Section 11501's Legislative History Confirms Congress' Intent to Allow Exemptions from a Generally Applicable State Tax Without Subjecting the Tax to Challenge under §11501(b)(4).

Section 11501's legislative history shows that Congress crafted the statute to ensure that interstate rail carriers were placed on equal footing with local businesses, not with individual competitors, largely because that is what the railroads asked for:

> In seeking an end to discriminatory taxes, railroads and other carriers are not looking for favoritism; rather we are only seeking fairness. We believe we should be assessed at the same rate as other taxpayers.

1972 Hearings at 356 (statement of AAR President Stephen Ailes). Similarly, Congress shielded tax exemptions from challenge because the States successfully fought to protect them.

### A. The Railroads Asked Congress for Equal Footing with Local Businesses "and Nothing More."

The railroads have no room to complain about §11501's limited scope; the AAR proposed §11501. *See* Doyle Report at 465-66. When the AAR first pitched §11501, it assured Congress that "[t]he proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers." *Id.* at 466. The proposal also made it clear that generally applicable taxes embodied the *goal* of §11501: "[§11501] has the obvious merit of insuring that such carriers would receive *equal treatment with other taxpayers subject to the same tax rates* in accordance with applicable State law." *Id.* (emphasis altered).

While the railroads' mantra has changed decades later, it remained constant throughout §11501's 15-year drafting process:

> I hope it is clear we are not here asking special tax favor from the States. We seek only the same treatment accorded other taxpayers—in other words, fairness, and nothing more.
>
> Our industry's just tax contributions have been an important cornerstone of State and local tax programs, and we expect to continue to pay our way and to contribute our fair share in assisting the States to meet their responsibilities to their residents.

*State Taxation Against Interstate Carrier Property, 1969: Hearings on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 91st Cong. 51 (1969) (hereinafter "1969 Hearing") (statement of AAR President Thomas M. Goodfellow).

Congress echoed the railroads' assurances that §11501 was only intended to place interstate carriers on equal footing with the general mass of taxpayers, not to grant favored status. *See, e.g.*, S. Rep. No. 90-1483, at 14 (1968) ("The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers."); S. Rep. No. 92-1085, at 7-8 (1972) ("[T]he measure *grants no favored status* to transportation property nor any windfall to carriers. It merely provides for equal treatment.") (emphasis added).

Congress' and the railroads' mutual understanding that "discrimination" was limited to taxes that treated railroads more harshly than local taxpayers is also reflected in their thoughts on §11501's scope and remedy. Both noted that only the "excessive" part of a state tax was "discriminatory," and thus subject to challenge, under §11501:

- "It is intended that only the tax resulting from the excessive portion of the assessment or rate shall be unlawful and subject to question," 1967 Hearings at 22 n.2 (statement of James Ogden on behalf of AAR);

- "This bill would declare unlawful that portion of the rate that is in excess of what is imposed generally upon property in the taxing district," *Id.* at 6 (Senator Frank Lausche);

In fact, the tax discrimination of "at least $50 million each year" cited by CSX at page 3 of its brief was not the amount of ad valorem taxes paid by rail carriers in the surveyed States; it was the amount of taxes the railroads would have saved if railroad property had been taxed in the same generally applicable manner as local property. *See infra* at 23a-25a (reproducing the relevant chart).

Simply put, generally applicable taxes—such as Alabama's 4% sales and uses taxes—give railroads everything they asked for, and all that Congress provided, in §11501.

### B. Congress Never Intended §11501's Comparison Class To Be Individual Interstate Competitors.

CSX claims that Alabama's sales and use taxes are discriminatory because they fail to put CSX on equal footing with two of its competitors. Blue Br. i, 13, 20-21. In other words, CSX claims that, when non-property taxes are involved, §11501(b)(4) grants rail carriers with most-favored-taxpayer status among interstate carriers because they are entitled to every tax exemption or benefit granted to another carrier. If this were true, no one would be more shocked than the railroads' competitors, who supported §11501 every step of the way.[7]

Congress rejected the original proposal to eliminate state taxes on railroads' and pipelines' rights-of-way, a proposal designed to equalize

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[7] CSX must focus on individual competitors because Alabama's generally applicable excise taxes on diesel fuel do not favor local over interstate businesses. Alabama's 4% sales and use taxes apply equally to any non-exempt business that powers its machinery or generators with diesel fuel. Alabama's 19¢ per gallon motor fuels excise tax applies equally to interstate and local truckers, as well as citizen motorists. Only Alabama's sales and use tax exemption for water carriers differentiates, and it does so by *favoring* interstate water carriers. Ala. Code §§40-23-4(a)(10), 40-23-62(12). The State acknowledges its suggestion during the preliminary injunction stage that CSX's competitors constitute the comparison class. Pet. App. 15a, n.3. As we stated at the petition stage, however, the text and history of §11501 clearly show that "the proper comparison class for subsection (b)(4) claims against property and non-property taxes is commercial and industrial taxpayers, not a hand picked competitor." Supp. Br. of Respondents 3, n.1.

property taxation among interstate carriers. Doyle Report at 463-65. Congress brushed aside the AAR's re-introduction of the idea 14 years later. *See* 1975 Senate Hearings at 1006, 1837 (statement of AAR President Stephen Ailes asking for both §11501 and exemptions from right-of-way taxes); 1975 House Hearings at 570 (same).

Instead, Congress adopted the AAR's proposal that protected "*all* common carriers engaged in interstate commerce" from discriminatory tax treatment. Doyle Report at 466 (emphasis added). Congress sought equality between interstate carriers and local businesses because interstate carriers "are nonvoting, often nonresident, targets for local taxation." *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)); *see also* 1972 Hearings at 1244 (Rep. Brock Adams) ("The basic problem in the past has been these are out-of-State companies coming in, and it's easier to tax out-of-State companies because they are non-voters."); Br. of Amicus AAR 8 ("this structural impulse [to discriminate against interstate carriers] is unchecked by any effective political counterweight, because the tax does not have to be paid by in-state voters").

Tellingly, representatives of the rail, motor, and water carriers sat side-by-side before Congress to support the bill, believing that "cooperative efforts among the modes could be of benefit to all types of carriers." 1972 Hearings at 347 (joint appearance by representatives of the AAR, the Water Transport Association ("WTA"), the American Trucking

Associations ("ATA"), and America's Sound Transportation Review Organization). While the ATA and WTA opposed parts of the 4-R Act, *see* 1975 Hearings at 1165, 1473, the ATA openly supported §11501 before the House and the Senate more than a year *after* subsection (b)(4) was added by the House. *See* 1975 Senate Hearings at 1178 (Statement of Peter Beardsley, Vice President and general counsel of the ATA); 1975 House Hearings at 621 (same).

If Congress had intended §11501(b)(4) to grant interstate rail carriers most-favored-taxpayer status among interstate and local carriers, then Congress should have made its intention clear so that the rail carriers' competitors would have argued for, instead of against, their own interest.[8] Congress never made such a statement, however, because that was not its intent.

### C. The States Were Assured That Tax Exemptions Would Not Be Subject To Challenge.

If the railroads' interstate competitors were hoodwinked, the States were too. For eight years, the States fought to protect their ability to grant tax exemptions free from the strictures of §11501. *See* Laronge, *supra*, 639-645. When Congress added "subject to a property tax levy" to the definition of "commercial and industrial property," 49 U.S.C. §11501(a)(4), thereby restricting the comparison

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[8] To comply with CSX's reading of §11501(b)(4), a State could strip non-railroad carriers of pre-existing exemptions and refuse to grant them new ones.

class to "taxed property," the States succeeded. *See ACF Industries*, 510 U.S. at 339-343 (interpreting the restricted comparison class to shield property tax exemptions from challenge); *ACF Industries*, *supra*, U.S. Br. 20 n.24 (crediting the narrowed class as Congress' "response to lobbying by the States"). Or so we thought.

The prospect that state tax exemptions could be subject to challenge is perhaps most troublesome in light of the debate over H.R. 5385, a draft of §11501 that included subsection (b)(4). *See* H.R. Rep. No. 93-1381, at 5 (1974). Louisiana Representative Gillis Long asked, point-blank, if §11501 would prohibit the States from granting property tax exemptions and was given the following responses:

- *Representative Staggers*: "We certainly have no intention of banning that practice."

- *Representative Adams*: "I want to assure the gentleman, as the chairman has said, that this provision is not one that would change or affect the practice that the gentleman from Louisiana has outlined. The purpose of this section is to provide that the States simply plug the transportation industry into their tax system, as they do other industry, so that if we have a rate for commercial and industrial property, this rate that we generally apply in the State applies to transportation with a plus or minus 5 percent."

- *Representative Kuykendall*: "I will say to the gentleman from Louisiana (Mr. LONG) that such arrangements made in any State do not change the tax structure of that individual locality. They are exceptions to the structure. We are referring only to the structure in this legislation."

120 Cong. Rec. 38734 (1974). The Representatives unequivocally assured that States could continue granting tax exemptions under §11501, assurances this Court cited as refuting the Carlines' argument in *ACF Industries* that "Congress intended to prohibit exemptions in subsection (b)(4)." 510 U.S. at 345-46.

Granted, Representative Long's question specifically referred to exemptions from "ad valorem taxes," not sales and use taxes. 120 Cong. Rec. 38734 (1974). But we should not assume that the Congressmen were mistaken or told half-truths. If they believed there was a distinction between exempting property and sales and use taxes, they should have made that belief clear so the States could have argued to protect our sales and use tax exemptions as well.[9]

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[9] Representative Long (La.) ultimately voted in favor of the 4-R Act. 122 Cong. Rec. 1358 (1976). No doubt he would have been surprised to learn that granting *non-property* tax benefits to interstate water carriers to re-energize Louisiana's seaports after disasters such as hurricanes or oil spills would violate §11501(b)(4) unless Louisiana extended the same benefits to land based railroads.

### D. Congress Had A Specific Target In Mind When It Wrote §11501(b)(4): In Lieu Gross Receipts Taxes.

CSX's legislative history argument is largely predicated on a research error. CSX argues that §11501(b)(4) must be read expansively because the Conference Committee rejected a "narrowly drawn" House version of §11501(b)(4) that "prohibit[ed] only 'the imposition of a discriminatory in-lieu tax'" in favor of the Senate's broad "imposition of any other tax" language. Blue Br. 19 (quoting S. Rep. No. 94-595, at 166 (1976) (Conf. Rep.)). But not only did both versions contain the same "any other tax" language, *compare* S Rep. 94-499 at 232 (1975) (S. 2718) *with* H.R. Rep. 94-725 at 19 (1975) (H.R. 10979), the Senate took its provision from the House version at the behest of the railroads. *See supra* at 8. The "in-lieu tax" language cited by CSX was the Conference Committee mimicking the House's *summary* of H.R. 10979, not the House bill itself. *Compare* S. Rep. No. 94-595, at 166 *and* H.R. Rep. No. 94-781, at 851 (1976) (Conf. Rep.) *with* H.R. Rep. No. 94-725, at 113 (1975) (summarizing H.R. 10979 and attaching the moniker "discriminatory in-lieu tax" to subsection (b)(4)); *see also* 121 Cong. Rec. 41404-29 (1975) (reciting the text of H.R. 10979).

CSX's error highlights a major flaw in its argument: Congress had a specific target in mind when it added §11501(b)(4), and it was not sales and use taxes or their exemptions. As the Court noted in *ACF Industries*, Congress and the railroads mentioned only one type of tax when discussing

§11501(b)(4): in lieu gross receipts taxes. 510 U.S. at 346.

Twice when the AAR charted discriminatory State property taxes for Congress, it noted that some States' figures were not included because the States imposed a gross receipts tax in lieu of an ad valorem property tax. *See* Doyle Report at 487; 1970 Hearings at 96; *see also* Dennis L. Thompson, *Taxation of American Railroads: A Policy Analysis* 70 (1981) (discussing States that exempted railroad property from ad valorem taxation and levied an "in lieu gross receipts tax" instead). As it became clear that subsections (b)(1)-(3) would end discriminatory ad valorem taxes, the railroads feared that States desiring to continue overtaxing railroad property would simply scrap their ad valorem taxes and impose heavy gross receipts taxes instead. *See* 1975 Senate Hearings at 1837 (AAR President Stephen Ailes asking the Senate to add "a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions"); 1883 (Stuart Johnson, on behalf of the New York Dock Railway, asking the Senate to add the House's version of §11501(b)(4) to protect his railway from New York's gross receipts tax). As the House versions of §11501 show, these in-lieu gross receipt taxes were §11501(b)(4)'s intended target. *See* H.R. Rep. No. 94-725, at 77 (referring to the target of subsection (b)(4) as the "so-called 'in lieu tax'"), 78 ("the Committee believes that discriminatory property and 'in lieu' taxation should be ended").

To be clear, we are not arguing that subsection (b)(4)'s "another tax" language is limited solely to in lieu gross receipts taxes. Frankly, we agree with the Carlines in *ACF Industries* that, with regard to whether §11501(b)(4) applies only to ad valorem property taxes or only to non-property taxes:

> [T]he language is not so very plain on either side that you can tell precisely what Congress meant, but what you can tell is what Congress' objective was here which was to avoid allowing railroads to be treated more harshly than the majority of other property within the State.

*ACF Industries*, *supra*, Oral Argument Tr. 36. As we stated *supra* at 24, even if sales and use taxes constitute "another tax" under §11501(b)(4), *generally applicable* sales and use taxes are not subject to challenge because they do not "discriminate against a rail carrier."

Our point is that Congress knew about the potential of States imposing in-lieu gross receipts taxes to sidestep subsections (b)(1)-(3) and explicitly stated that subsection (b)(4) would remedy the problem. On the other hand, Congress never mentioned that exemptions to a generally applicable sales and use tax would be subject to challenge under §11501(b)(4), despite Congress' knowledge of their prevalence. *See* Part II.B. This is further proof that Congress did not intend to prohibit exemptions from state sales and use taxes.

## IV. Limiting "Discrimination" to Taxes that Single Out or Target Interstate Rail Carriers Does Not Render §11501(b)(4) a Nullity.

Reading §11501(b) to prohibit challenges to the granting of exemptions from a generally applicable tax does not render subsection (b)(4) a nullity. Congress and the courts have provided examples of taxes that could be subject to challenge under §11501(b)(4) because the taxes "singled out" or "targeted" railroads with a proportionately higher tax burden than other businesses. *ACF Industries*, 510 U.S. at 346-47.

Section 11501(b)(4) could proscribe the one tax that both Congress and the railroads discussed: a discriminatory in lieu gross receipts tax. Using the railroads' example to the Senate, §11501(b)(4) would bar a State from removing interstate rail carriers from its generally applicable ad valorem property tax structure and imposing a more expensive gross receipts tax in its stead. 1975 Senate Hearings at 1883 (statement of Stuart Johnson describing New York's gross receipts tax).

In *ACF Industries*, the Court cited *Burlington Northern Railroad Co. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), as providing an example of a tax that might violate §11501(b)(4) because it "singled out railroad property for discriminatory treatment." *ACF Industries*, 510 U.S. at 346-47. In that case, the Seventh Circuit struck down Wisconsin's occupational tax on the owners and

operators of iron ore concentration docks because, in practical effect, it applied to the docks owned by one rail carrier.

Lower courts have provided similar examples. In *Burlington Northern & Santa Fe Railway Co. v. Atwood*, a district court struck down Wyoming's "Coal Transportation Tax" because it "single[d] out railroads in that they are liable for more than 99% of the total Coal Transportation Tax." 271 F. Supp. 2d 1359, 1363 (D. Wyo. 2003). The tax was therefore "not generally applicable to other commercial and industrial taxpayers." *Id.* at 1367. The Washington Supreme Court similarly struck down a city's tax on the transfer of solid waste from trucks to trains because "the only activity subject to the tax is the transfer made by [the plaintiff's] employees at the rail yard." *Regional Disposal Co. v. Centralia*, 51 P.3d 81, 82 (Wash. 2002).

Using the Court's parlance, the common thread in these cases is that the state tax "singled out" or "targeted" rail carriers with a tax burden not shared by the general mass of commercial and industrial taxpayers. *ACF Industries*, 510 U.S. at 346-47. In *Burlington Northern v. City of Superior*, Judge Posner listed several other examples of state taxes that might violate §11501(b)(4) in the same manner: "a tax on operating rail crossing signals, on selling railroad passenger tickets, on loading tank cars, on hoisting containers from flat cars onto flatbed trucks—or on placing iron ore concentrates shipped by rail on wharves for further shipment." 932 F.2d at 1187.

In short, limiting §11501(b)(4) to the imposition of a tax burden on railroads that is not shared proportionately by local businesses does not render the provision a nullity. It limits §11501(b)(4) in the manner that the statute's text and legislative history provides.

## V. If the Court Holds that Generally Applicable Sales and Use Taxes Are Subject to Challenge, the Court Should Declare that, on Remand, the District Court May Consider Both of Alabama's Excise Taxes on Diesel Fuel.

As we explained in the petition stage, the railroads have predicated their diesel fuel lawsuits against seven States, at least in part, on the States' differentiation between excise taxes on off-road diesel fuel (sales and use taxes) and on-road diesel fuel (motor fuels taxes). Supp. Br. of Respondents 9-10; U.S. Br. Petition Stage 15-16. Playing this differentiation to their advantage, the railroads argue that district courts must cabin their "discrimination" inquiry to the sales and use tax statutes being challenged, thereby blinding courts to the motor carriers' payment of excises taxes found elsewhere in the code. *See* CSX Petition Stage Reply Br. 2-4 (arguing that courts should "focus solely on the particular tax at issue and forgo examination of a State's overall tax structure").

If the Court agrees with CSX that generally applicable sales and use taxes are subject to challenge under §11501, we ask the Court to declare

that district courts may take into account the taxes paid by the railroads' competitors on the same taxable event when judging the railroads' claim. In this case, the taxable event would be the purchase or consumption of diesel fuel, and the district courts could take into account payment of either of Alabama's excise taxes on diesel fuel: motor fuels (Chapter 17) or sales and use (Chapter 23).

The United States agrees with the State that "a court should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers." U.S. Petition Stage Br. 17. So did the lone dissent in *ACF Industries*. *ACF Industries*, 510 U.S. at 352 n.4 (Stevens, J. dissenting) ("A State might, for example, be able to defend an exemption by showing that the exempted class was subject to an equivalent tax to which railroads were not."). In fact, forcing courts to wear blinders when viewing the State's tax code would strip the States' ability to justify facially discriminatory sales and use taxes with proof of a complimentary tax imposed on the exempt business. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (outlining the "compensatory/complimentary" tax doctrine); U.S. Br. 25 ("Subsection (b)(4) prohibits 'discrimination,' not 'differentiation.' A state tax that treats a rail carrier differently than a similarly situated person 'discriminates against a rail carrier' only if the State cannot justify the differences in treatment.") (citations omitted). And contrary to CSX's petition-stage assertions, simply looking at the face of a state code to see that a railroad's competitor pays a flat

19¢ excise tax is not so difficult that it should deprive the States of millions of dollars in non-discriminatory tax revenues. CSX Petition Stage Reply Br. 2-3.

By taking this extra step, the Court might prevent years of unnecessary litigation based on the nationwide on-road versus off-road diesel fuel tax dichotomy, thereby preventing legitimate State tax revenues from being held in escrow pending a resolution of the issue.[10]

* * *

Section 11501 achieved the railroads' original objective: It forced the States to place interstate rail carriers on equal tax footing with other commercial and industrial taxpayers. *See* Ala. Code §40-8-1(b)(5) (requiring that, as of September 30, 1979, all "transportation property" subject to the 4-R Act be taxed at the generally applicable rate of 20%). If the railroads now desire the same tax benefits given to individual businesses, thereby elevating interstate rail carriers from equals to the State's most-favored-taxpayers, they need to ask Congress to re-write §11501.

[10] For example, the lawsuit currently stayed in Tennessee pending resolution of this appeal is predicated solely on Tennessee's exemption for motor carriers that pay the State's motor fuels tax. *See Illinois Cent. R.R. v. Tennessee Dep't of Rev.*, No. 3:10-CV-197 (M.D. Tenn.) (Docket No. 1).

## CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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# APPENDIX

49 U.S.C. §11501 ..... 1a

Former 49 U.S.C. §13(4) ..... 4a

4-R Act Legislative History Highlights ..... 6a

S. Rep. No. 92-1085, at 6 (1972) ..... 23a

**49 U.S.C. § 11501**

**Tax discrimination against rail transportation property**

(a) In this section--

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a

property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

## Former 49 U.S.C. § 13(4)[1]

### Duty of Commission where State regulations result in discrimination.

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided*, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of

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[1] The statute is reproduced as it was set out in *Public Service Commission v. United States*, 365 F. Supp. 6, 8 9 (S.D. W. Va. 1973) (three-judge court) (per curiam).

any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

| Date | Description |
|---|---|
| June 26, 1961 | Doyle Report is published. *See* S. Rep. No. 87-445 (1961). The report outlines two proposals:<br>• A statute preempting state and local taxation of railroad right-of-way property, *see id.* at 463, to ensure "equality of opportunity . . . between our Nation's transportation carriers," *id.* at 465.<br>• A statute, proposed by the Association of American Railroads (AAR), allowing interstate carriers to seek relief in federal court from excessive property assessments and taxes collected thereon. *Id.* at 465-66. |
| Aug. 7-8, 1967 | Senate holds hearings on S. 927, which embraces the AAR proposal and adds a prohibition on excessive rates. Carrier property tax rates would be compared to those imposed on "any other property in the taxing district." *Discriminatory Taxation of Common Carriers: Hearing on S. 927 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 90th Cong. 2 (1967). |

| Date | Description |
| --- | --- |
| | • USDOT: Transportation carriers are discriminated against "as compared to other property taxpayers in the jurisdiction." *Id.* at 3.<br>• AAR: "We are really trying not to . . . put the railroads in a special class. We are trying to get out of being in a special class." *Id.* at 21.<br>• USDOJ: Section 11501 makes clear that "only the excessive *portion* of the tax is declared unlawful." *Id.* at 4.<br>• *Sen. Lauche*: "This bill would declare unlawful that portion of the *rate* that is in excess of what is imposed generally upon property in the taxing district." *Id.* at 6.<br>• AAR: "It is intended that only the tax resulting from the excessive portion of the assessment or rate shall be unlawful and thus subject to question." *Id.* at 22. n.2.<br>• AAR: Section 11501 "is not intended to interfere with or restrict State action in extending total or partial exemption to property of any class, such as churches, charitable institutions, homesteads, and the like." *Id.* at 82. |

| Date | Description |
| --- | --- |
| July 29, 1968 | Senate Commerce Committee reports favorably on S. 927 (with amendments). *See* S. Rep. No. 90-1483 (1968).<br>▪ "[I]nterstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily their right-of-way and terminals." *Id.* at 2.<br>▪ Section 11501 "make[s] clear the intent that only the excessive portion of the tax is declared unlawful. *Id.* at 9-10.<br>▪ "[P]roperty totally or partially exempted is not intended to be taken as a measure of 'any other property'" for purposes of the excessive tax rate provision. *Id.* at 11.<br>▪ Conclusion: "The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers." *Id.* at 14. |
| July 30, 1969 | Senate holds hearings on S. 2289. Section 11501 contains provisions analogous to present-day subsections (b)(1), (b)(2), and (b)(3). *State* |

| Date | Description |
|---|---|
| | *Taxation Against Interstate Carrier Property, 1969: Hearings on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 91st Cong. 1-2 (1969).<br>• AAR: The discrimination arises because the effective tax rate "differs for the railroads and is greater than that which is applied to property generally." *Id.* at 34.<br>• AAR: "[W]e are not here asking special tax favor from the States. We seek only the same treatment accorded other taxpayers—in other words, fairness, and nothing more. . . . [W]e expect to continue to pay our way and to contribute our fair share in assisting the States to meet their responsibilities to their residents." *Id.* at 51. |
| Dec. 20, 1969 | Senate Commerce Committee reports favorably on S. 2289 (with amendments). *See* S. Rep. No. 91-630 (1969).<br>• The committee adopted an amendment that would provide a "5 percent tolerance factor to protect taxing districts from the issuance of an injunction or other restraining process in case of an insignificant variation in assessments." *Id.* at 14. |

| Date | Description |
| --- | --- |
| June 9, 1970 | House holds hearings on S. 2289 and six "identical" bills. *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, and S. 2289 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 1 (1970).<br>• Interstate Commerce Commission (ICC): Section 11501 will prevent State and local tax treatment of carrier property "on a different basis than other property in the same taxing district." *Id.* at 4.<br>• American Trucking Associations (ATA): "This legislation is essential to assure the regulated transportation industries of fair and impartial treatment in the taxation of these properties." *Id.* at 141.<br>• Maryland Department of Assessments and Taxation: "If [a] comparison is to be made, then for the sake of equality it should be between transportation property and all other commercial or business property." *Id.* at 143. |

| Date | Description |
|---|---|
| Nov. 4, 1971-Jan. 26, 1972 | Senate holds hearings on various legislation which include §11501 as part of a larger set of reforms. *Surface Transportation Legislation: Hearings on S. 2362, Surface Transp. Act of 1971, S. 1092, S. 1914, S. 2365, S. 2841, S. 2842, and S. Con. Res. 56 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 92d Cong. (1972).<br>▪ Sen. Beall: "For the first time in my memory, the regulated modes of surface transportation have joined together to seek legislation which they believe will be beneficial to all regulated modes of transportation." *Id.* at 148.<br>▪ ATA: The bill will prohibit state taxation of transportation property at higher assessment ratios and rates than "other property generally." *Id.* at 182.<br>▪ AAR: "[W]hat we ask for is not to be set in a special class." *Id.* at 282.<br>▪ AAR: "Those subject to this legislation will pay the tax at the same rate as the States impose on everyone else, and on the same basis of valuation. . . . This simply says carriers pay as others pay, and are not to be singled out for discrimination." *Id.* at 285. |

| Date | Description |
|---|---|
| | ▪ AAR: "[W]hat is burdensome is that tax which is paid by the railroads when they are singled out because they are railroads and told, you pay at three times what the other properties pay." *Id.* at 292.<br>▪ Sen. Beall: "[W]e don't want to move from discrimination to what appears to be favoritism. We want to move to fairness and equality of treatment." *Id.* at 296.<br>▪ Transportation Association of America (TAA): "We favor these carriers' being treated on the same basis as other property tax payers—no better and no worse." *Id.* at 323.<br>▪ ICC: "[W]e are interested in securing equality of tax treatment for carriers but would not support giving them a preference." *Id.* at 338. |
| March 27-<br>May 12, 1972 | House holds hearings on a number of "broad bills affecting surface transportation." *Transportation Act of 1972: Hearings on H.R. 11824, H.R. 11826, and H.R. 11207 (and All Identical Bills) Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 1 (1972). |

| Date | Description |
|---|---|
| | ▪ AAR: "In seeking an end to discriminatory taxes, railroads and other carriers are not looking for favoritism; rather we are only seeking fairness. We believe we should be assessed at the same rate as other taxpayers." *Id.* at 356.<br>▪ ATA: "Common and contract carriers by rail, truck, and barge should no longer bear this burden of discriminatory tax treatment." *Id.* at 424.<br>▪ Rep. Adams: "The basic problem in the past has been these are out-of-State companies coming in, and it's easier to tax out-of-State companies because they are nonvoters." *Id.* at 1244.<br>▪ Rep. Adams: "All this bill is trying to do is just say treat interstate nonvoting people the same way that you treat local people, not to give them special treatment." *Id.* at 1305.<br>▪ Rep. Adams: "What we are trying to do is to prevent discrimination . . . [w]e don't particularly want to put anybody into a favored position." *Id.* at 1317. |
| Sept. 1, 1972 | Senate Commerce Committee reports favorably on S. 3945. *See* S. Rep. No. 92-1085 (1972). Section 11501 applies to all carriers. For the first time, §11501 requires comparison with "all other commercial |

| Date | Description |
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| | and industrial property" (or "public utility property," if applicable). *Id.* at 2.<br>• Section 11501 would declare unlawful the "collection of that part of taxes based on discriminatory assessment." *Id.* at 3.<br>• "[T]he measure grants no favored status to transportation property nor any windfall to carriers. It merely provides for equal treatment." *Id.* at 7-8.<br>• "[T]he measure interferes to the least extent possible with State taxing systems." *Id.* at 8. |
| Mar. 26- July 3, 1974 | House holds hearings on two related bills. For the first time, §11501 contains a clause similar to present-day subsection (b)(4). *Surface Transportation Legislation: Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694, and S. 1149 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 24 (1974).<br>• Water Transport Association: "Title II—*Provisions Relating to Discriminatory State Tax Practices*, is ready. It has the support of almost everyone." *Id.* at 496. |

| Date | Description |
|---|---|
| Sept. 26, 1974 | House Interstate and Foreign Commerce Committee reports favorably on H. 5385 (with an amendment). *See* H.R. Rep. No. 93-1381 (1974). Section 11501 contains a clause analogous to present-day subsection (b)(4). *Id.* at 5.<br>▪ The Report describes the new clause as targeting the "so-called 'in-lieu tax'." *Id.* at 36. |
| Dec. 10, 1974 | House Committee of the Whole considers H.R. 5385. *See* 120 Cong. Rec. 38,732-58 (1974).<br>▪ Rep. Long asks whether §11501 would preclude property tax exemptions a State might extend "to encourage economic development within the State." *Id.* at 38,734.<br>▪ Rep. Staggers: "[W]e do not touch on that in any way or prohibit it. . . . We certainly have no intention of banning that practice." *Id.*<br>▪ Rep. Adams: "[T]his provision is not one that would change or affect the practice [Rep. Long] has outlined." *Id.* |

| Date | Description |
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| | ▪ Rep. Adams: "The purpose of this section is to provide that the States simply plug the transportation industry into their tax system, as they do other industry, so that if we have a rate for commercial and industrial property, this rate that we generally apply in the State applies to transportation ." *Id.*<br>▪ Rep. Adams: Section 11501 "is directed only at certain abuses that have grown up in the country where a particular State or county, because it had somebody who was not a local citizen and did not vote there but was just passing through as an interstate carrier, would tax them more heavily than their local people because they did not vote." *Id.*<br>▪ Rep. Adams: "[T]his provision would not affect these specific exemption-type industrial development programs that [Rep. Long] has outlined." *Id.*<br>▪ Rep. Adams: "[W]e have tried to say in this bill with respect to transportation properties throughout the United States that we should tax them as we do other commercial and industrial properties." *Id.* at 38,755. |

| Date | Description |
|---|---|
| | ▪ Rep. Staggers: "All we are trying to say is that the taxation for transportation property shall be the same as for any other commercial property within a State." *Id.* at 38,756. |
| July 15-24, 1975 | House holds hearings on two bills containing §11501, each of which include the "any other tax" clause. *See Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 15-18 (1975); *id.* at 51-54. For the first time, one version applies only to railroads. *See id.* at 15-18.<br>▪ USDOT: Discriminatory state tax practices "place an unjust burden upon these carriers and contribute to their financial problems by taxing them at a higher rate than similar property of other businesses in the same taxing jurisdiction." *Id.* at 162.<br>▪ TAA: In response to opponents' "legitimate concerns," "the bill has been worded to make it perfectly clear that the railroads are not to be given preferential treatment, but treated on the same basis as other industrial and commercial taxpayers." *Id.* at 768. |

| Date | Description |
|---|---|
| Sept. 9-19, 1975 | Senate holds hearings. Its versions of §11501 remain applicable to all carriers, and do not contain the "any other tax" clause. *Railroads-1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce (Part 4)*, 94th Cong. (1976).<br>• ATA: "We favor the provisions of S. 1876 and S. 2265 which would prohibit the discriminatory taxation of carrier property . . . ." *Id.* at 1166. |
| Oct. 20-30, 1975 | Senate continues hearings. *Railroads-1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce (Part 5)*, 94th Cong. (1976).<br>• AAR: "We suggest that the bill be amended by adding a fourth provision, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions [currently in the draft]." *Id.* at 1837. |

| Date | Description |
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| | ▪ New York Dock Railway: Adding the "any other tax" clause "would be of material benefit to New York Dock Railway because it is subject to a New York City gross receipts tax applicable to public utilities. Rail gross receipts are taxed at a higher rate than other public utilities." *Id.* at 1883.<br>▪ TAA: "[C]arriers are not to be given preferential treatment, but treated on the same basis as other industrial and commercial taxpayers." *Id.* |
| Nov. 26, 1975 | Senate Commerce Committee reports favorably on S. 2718. *See* S. Rep. No. 94-499, at 1 (1975). Section 11501 applies to all transportation modes. For the first time, the Senate's version of §11501 includes the "any other tax" clause. *Id.* at 232. |
| Dec. 4, 1975 | Senate passes S. 2718. *See* 121 Cong. Rec. 38,492 (1975). |
| Dec. 12, 1975 | House Committee reports favorably on H.R. 10979. *See* H.R. Rep. No. 94-725, at 1 (1975). Section 11501 applies to railroads and includes a clause similar to present-day subsection (b)(4). *Id.* at 19-20.<br>▪ Summary of provisions: The clause addresses "the imposition of a discriminatory 'in-lieu tax.'" *Id.* at 113. |

| Date | Description |
|---|---|
| Dec. 17, 1975 | House Committee on the Whole considers H.R. 10979. *See* 121 Cong. Rec. 41,334-429 (1975). Section 11501 covers railroads only and contains a clause akin to present-day subsection (b)(4). *See, e.g., id.* at 41,413.<br>▪ Rep. Skubitz: Any state attempt "to impose a higher rate of tax than the true market value of the rail property, would be considered a burden on interstate commerce and, therefore, unconstitutional." *Id.* at 41,341.<br>▪ Rep. Adams: "We have had the proposition in the United States by which States have decided that they want to tax the non-voters, in other words, transportation companies coming through the States, at rates greater than those that apply to other commercial property. . . . What we are saying is that an industry is an industry and should be taxed within 5 percent up or down of how we are taxing the others in the State in order to avoid discrimination." *Id.* at 41,401. |
| Dec. 17, 1975 | House passes H.R. 10979. *See* 121 Cong. Rec. 41,404 (1975). |

| Date | Description |
|---|---|
| Dec. 19, 1975 | The conference committee files a report reconciling H.R. 10979 and S. 2718. *See* H.R. Rep. No. 94-768 (1975) (Conf. Rep.), *as reprinted in* 121 Cong. Rec. 41,888-41,940 (1975) [hereinafter "the first conference report"]. The Senate bill covered all interstate carriers while the House bill covered rail carriers. *See id.* at 41,926 (joint explanatory statement); *see also id.* at 41,413 (setting out the text of H.R. 10979). The conference substitute "follows the Senate bill" and would cover all interstate carriers subject to the Interstate Commerce Act. *Id.* at 41,926.<br>• In describing the "any other tax" clause, the report says it would forbid the "imposition of a discriminatory 'in-lieu tax.'" *Id.* at 41,926. |
| Dec. 19, 1975 | Both the House and Senate agree to the first conference report. *See* 121 Cong. Rec. 41,967 (1975) (House passage); *id.* at 42,209 (Senate passage). |

| Date | Description |
|---|---|
| Jan. 20-21, 1976 | The House and Senate adopt H. Con. Res. 527, vacating adoption of the first conference report and recommitting it to the conference committee. *See* 122 Cong. Rec. 285-86 (1976) (House), *id.* at 457 (Senate). |
| Jan. 23, 1976 | The conference committee files a second report reconciling H.R. 10979 and S. 2718. *See* H.R. Rep. No. 94-781 (1976) (Conf. Rep.), *as reprinted in* 122 Cong. Rec. 812 (1976) [hereinafter "the second conference report"]. "The conference substitute . . . limited the provision to taxation of railroad property." *Id.* at 851.<br>▪ A third conference report, filed January 27, 1976, is identical in all relevant respects. *See* S. Rep. No. 94-595 (1976) (Conf. Rep.). |
| Jan. 28, 1976 | Both the House and Senate consider and agree to the second conference report. *See* 122 Cong. Rec. 1334 (1976) (Senate consideration); *id.* at 1342 (Senate passage); *id.* at 1350 (House consideration); *id.* at 1359 (House passage). |
| Feb. 5, 1976 | The President signs the Railroad Revitalization and Regulatory Reform Act of 1976. *See* 122 Cong. Rec. 2514 (1976). |

[S. Rep. No. 92-1085, at 6 (1972)]

| State | 1970 railroad ad valorem taxes | Percent of value at which railroad property assessed 1970 | Percent of value at which property of others assessed | Estimated reduction in railroad ad valorem taxes if railroad assessments had been made at the same percent of value as were the assessment of property of others | Percent of tax excessive |
|---|---|---|---|---|---|
| Alabama . . . . . | $2,772,497 | 30.00 | 16.90 | $1,210,749 | 43.67 |
| Arizona . . . . . | 8,859,434 | 60.00 | 24.45 | 5,101,262 | 57.58 |
| Arkansas . . . . . | 4,054,205 | 20.00 | 12.20 | 1,581,140 | 39.00 |

| [State] | [1970 RR ad valorem taxes] | [% at which RR property assessed 1970] | [% at which property of others assessed] | [Estimated discriminatory tax] | [% of tax excessive] |
|---|---|---|---|---|---|
| Idaho . . . . . | 4,008,262 | 28.42 | 11.90 | 2,330,003 | 58.13 |
| Kansas . . . . . | 12,864,848 | 30.00 | 20.00 | 4,287,854 | 33.33 |
| Louisiana . . . . . | 4,362,340 | 30.00 | 17.10 | 1,875,806 | 43.00 |
| Mississippi . . . . . | 3,303,716 | 30.00 | 13.50 | 1,817,044 | 55.00 |
| Missouri . . . . . | 12,799,932 | 40.00 | 28.69 | 3,619,821 | 28.28 |
| Montana . . . . . | 6,972,197 | 20.00 | 11.70 | 2,893,462 | 41.50 |
| Nebraska . . . . | 5,439,292 | 35.00 | 28.00 | 1,087,859 | 20.00 |
| North Dakota . . . | 3,386,019 | 33.33 | 21.10 | 1,242,667 | 36.69 |
| Ohio . . . . . | 28,582,137 | 55.37 | 37.35 | 9,300,627 | 32.54 |
| Oklahoma . . . . . | 6,276,953 | 35.00 | 17.57 | 3,125,922 | 49.80 |
| Tennessee . . . . . | 6,517,322 | 45.00 | 30.00 | 2,172,223 | 33.33 |

| [State] | [1970 RR ad valorem taxes] | [% at which RR property assessed 1970] | [% at which property of others assessed] | [Estimated discriminatory tax] | [% of tax excessive] |
|---|---|---|---|---|---|
| Utah . . . . . | 4,504,779 | 27.50 | 15.67 | 1,937,956 | 43.02 |
| South Carolina . . | 2,907,891 | 10.14 | 5.00 | 1,474,010 | 50.69 |
| Total . . . . . | 117,611,824 | . . . . . | | 45,058,405 | 38.31 |
| 5 other States in which there is material discrimination, but where the percentage of discrimination is less than 20% | 50,445,459 | . . . . . | | 8,708,533 | 17.26 |

# REPLY BRIEF

Supreme Court, U.S.
FILED
OCT 20 2010
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No. 09-520

IN THE

# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY BRIEF

After prohibiting specific, carefully defined forms of unlawful property tax discrimination, the anti-tax discrimination provision of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") concludes by prohibiting the States from "[i]mpos[ing] another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). Respondents do not deny the breadth of the terms employed in this catchall provision. Respondents do not deny that the ordinary meaning of the broad terms would prohibit a state from imposing a tax on a railroad that discriminates against it by exempting the railroad's competitors from the tax. Instead, respondents argue that "discriminates" is used in a special and unique sense, one that is not expressly defined in the section of the statute that defines other terms, *id.* § 11501(a), but rather is left for courts to discern by criss-crossing around the statute and twisting it like a pretzel. The end result, according to respondents, is that "discriminates" means treating unfavorably, but not if the railroads are treated unfavorably by the use of exemptions from a tax, and not if the railroads are treated unfavorably by comparison to their direct competitors. According to respondents' strained interpretation, only unfavorable treatment of railroads vis-à-vis local businesses accomplished without using exemptions constitutes actionable discrimination. Incredibly, after poking massive holes into this broad catchall provision, respondents conclude by urging the railroads, if they are unhappy with respondents' handiwork, "to ask Congress to re-write § 11501." Resp. Br. 60.

Petitioner prefers the statute as written, and asks this Court simply to interpret it as such. Petitioner also asks this Court simply to answer the narrow

question that this Court adopted upon granting certiorari. The Eleventh Circuit did not purport to determine what counts as unlawful discrimination under § 11501(b)(4). It never reached that issue because it ruled that Congress, in the statute, preserved the States' authority to impose non-property taxes on railroads while exempting their competitors just as Congress had preserved the States' authority to impose property taxes on railroads while exempting non-railroad property. Whether such non-property tax exemption schemes are even subject to challenge as discrimination is all this Court agreed to review. In this proceeding, this Court need say no more than that a railroad may challenge a non-property tax imposed on it as discriminatory based on exemptions.

## I. THE TEXT AND STRUCTURE OF § 11501(b) PERMITS A CHALLENGE TO NON-PROPERTY TAXES THAT EXEMPT RAILROAD COMPETITORS.

1. Section 11501(b) has three distinct parts. First, the opening paragraph declares that "[t]he following acts unreasonably burden and discriminate against interstate commerce" and that States and their subdivisions are prohibited from adopting such measures. As the language makes clear, this opening paragraph merely declares that the States are prohibited from doing the acts that follow, along with the reason Congress chose to prohibit them. Second, the first three subparagraphs identify particular prohibited acts with regard to property taxes. 49 U.S.C. § 11501(b)(1)-(3). Third, the last subparagraph is a generally worded catchall that prohibits "[i]mpos[ing] another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4). Given this language and structure, which are the starting points for any

question of statutory construction, *Jiminez* v. *Quarterman*, 129 S. Ct. 681, 685 (2009), it is hard to imagine what Congress could say that would more clearly indicate that Congress has proscribed a broader range of acts with respect to non-property taxes than with respect to property taxes.

The portion of the statute addressed exclusively to property taxes, subsections (b)(1)-(3), is specific. It identifies the taxes to which railroad property taxes are to be compared: taxes concerning "other commercial and industrial property in the same assessment jurisdiction." Indeed, because the phrase "commercial and industrial property" is a defined term, the comparison class with regard to property taxes is even more narrow than the ordinary meaning of the language employed would suggest. For instance, agricultural and timber property would comfortably fit within the ordinary meaning of "commercial and industrial property." But Congress chose to permit the States to continue to discriminate against railroad property as compared with agricultural and timber property. 49 U.S.C. § 11501(a)(4) (defining "commercial and industrial property" to exclude agricultural and timber property). Likewise, on its face the phrase "commercial and industrial property" would comfortably cover both taxed and exempt property. But Congress chose to permit the States to continue to discriminate against railroad property as compared with other commercial and industrial property that a State has exempted from property taxes. *Id.* (defining "commercial and industrial property" to include only "property ... subject to a property tax levy").

By contrast, the portion of the statute that reaches non-property taxes is general. It broadly prohibits "another tax that discriminates against a rail

carrier." As the parties agree, the word "another" means the same as "any other," which appeared in the original version of the statute. Resp. Br. 9 n.1; Pet. Br. 4 n.1. So subparagraph (b)(4) includes "other" (not exclusively property) taxes, and prohibits discrimination against railroads with respect to them. No defined terms are used in subsection (b)(4), like those in subsections (b)(1)-(3), that have the effect of narrowing the scope of the ordinary meaning of the broad terms employed. There is, thus, no reason to conclude that Congress shielded from challenge a railroad's claim of discrimination based on non-property tax exemptions provided to its competitors.

2. Despite the conspicuous absence of the kind of specific, narrowing language in subsection (b)(4) that this Court held authorized the states to discriminate by use of tax exemptions with regard to property taxes, *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994), respondents contend that the statute as a whole provides a "singular definition of discrimination," Resp. Br. 18, through which Congress "express[ed] its intent to prevent exemptions from being considered discriminatory," *id.* at 19. Respondents never deny that the ordinary meaning of the word "discriminates" with regard to taxes encompasses taxing the protected class while exempting others similarly situated from that tax. *ACF Indus.*, 510 U.S. at 343 ("It is true that tax exemptions, as an abstract matter, could be a variant of tax discrimination."); see U.S. Br. 8 (quoting *Black's Law Dictionary* 534 (9th ed. 2009)) (defining "discrimination" to mean "'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored'"). Respondents never even discuss the numerous cases in petitioner's

opening brief that have recognized that tax exemptions are a form of discrimination. *Ark. Writers' Project* v. *Ragland*, 481 U.S. 221 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Minneapolis Star & Tribune Co.* v. *Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Walling* v. *Michigan*, 116 U.S. 446 (1886). Instead, respondents argue that Congress provided a special definition, different from its ordinary meaning, for the word "discriminates" throughout § 11501(b). Resp. Br. 25. Respondents reach this conclusion by mangling the statute.

As an initial matter, if Congress meant to attribute a special, narrow meaning to the word "discriminates" § 11501(b), one would expect Congress to provide that definition in § 11501(a), where Congress specified the narrow meaning it was attributing to other terms in the statute. Of course, "discriminates" is not among the 4-R Act's defined terms. That the statute defines some terms, but not others, provides especially strong reason to apply the undefined terms in their ordinary sense. *Lopez* v. *Gonzales*, 549 U.S. 47, 53-54 (2006) ("Congress can define [a statutory term] in an unexpected way. But Congress would need to tell us so ...."); *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995).

Respondents root their made-up proposition—that the word "discriminates" has a specially defined meaning throughout § 11501(b)—in the doctrine of *ejusdem generis*. Resp. Br. 26-27. Under that doctrine, "'[w]here general words follow specific words *in a statutory enumeration*, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S.

105, 114-15 (2001) (emphasis added; alteration in original) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)).

The doctrine applies when a statute enumerates specific objects "in the same sentence" as a general phrase, *id.* at 114, because otherwise the specifically identified objects would have no independent meaning or effect. In *Circuit City*, for instance, the relevant sentence of the statute enumerated certain contracts to which the Federal Arbitration Act did not apply, "'contracts of employment of seamen, [and] railroad employees,'" and concluded its list with the broad phrase "'or any other class of workers engaged in foreign or interstate commerce.'" *Id.* at 112 (quoting 9 U.S.C. § 1). As this Court reasoned, if the phrase "any other class of workers engaged in interstate or foreign commerce" were given the unqualified, broad scope that those words in isolation suggest, then "there would be no need for Congress to use the phrases 'seamen' and 'railroad employees'" in the statute at all. *Id.* at 114. The Court limited the otherwise broad phrase to the characteristics of the enumerated items to preserve some effect for the specifically enumerated terms. *Id.* at 114-15; see *Begay* v. *United States*, 553 U.S. 137, 142 (2008) (general phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" is narrowed in scope by preceding enumeration of specific crimes).

In § 11501(b), there is no need to narrow the meaning of the word "discriminates" to give effect to any other term in the statute. This Court, in *ACF Industries*, has already made clear what is necessary to ensure that subsection (b)(4) does not render other parts of § 11501 "inoperative." 510 U.S. at 340. Subsection (b)(4) does not encompass those forms of

tax discrimination that subsections (b)(1)-(3) expressly permit: discrimination against railroads in *property taxes* as compared with agricultural and timber property, *id.*, and discrimination against railroads in *property taxes* as compared with property exempt from property taxes altogether, *id.* at 343. Importantly, the interpretation of subsection (b)(4) that prevents the statute from "nullify[ing]" itself, *id.*, turns not on the word "discriminates" in subsection (b)(4), but on the phrase "another tax." This Court in *ACF Industries* concluded that the "other" taxes covered by (b)(4) must exclude those specifically authorized by Congress in (b)(1)-(3).

Respondents are thus asking the wrong question when they ask "what characteristic is shared by subsections (b)(1)-(b)(3) that helps define *discrimination* in subsection (b)(4)." Resp. Br. 27 (emphasis added). Subsections (b)(1)-(3) do not limit the meaning of discrimination at all. The right question is what characteristic is shared by subsections (b)(1)-(3) that helps define *another tax* in subsection (b)(4). And that question was answered in *ACF Industries*: because subsections (b)(1)-(3) authorize certain discriminatory property taxes, the "other" taxes that are not allowed to discriminate against railroads must be different from those.

Contrary to respondents' argument, Resp. Br. 28, this Court has never said, and nothing in the text or structure of § 11501(b) suggests, that exempting non-railroad commercial property from taxation is not discrimination within the meaning of § 11501(b). Indeed, this Court's characterization of the State's argument in *ACF Industries* assumes the existence of "discriminatory property tax exemptions," *ACF Indus.*, 510 U.S. at 339, but that Congress expressly chose not to prohibit that kind of discrimination. *Id.*

at 343 (holding that "subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of nonrailroad property."). And *ACF Industries* further expressly acknowledges "that tax exemptions, as an abstract matter, could be a variant of tax discrimination." *Id.*

In the end, respondent is right in one small respect: "not *every* state tax that grants an exemption is challengeable under § 11501(b)(4)." Resp. Br. 24. Petitioner readily accepts what *ACF Industries* requires: state *property* taxes that grant exemptions are not challengeable under § 11501(b)(4) because Congress, in subsections (b)(1)-(3) expressly left to the states the authority to discriminate through property tax exemptions (so long as they do not effectively single out railroads for taxation, *ACF Indus.*, 510 U.S. at 346). But *non-property taxes* are not addressed at all in subsections (b)(1)-(3). As a result, the text and structure of §11501(b) as a whole supports the view that a *non-property* state tax that discriminates, even by granting exemptions, is challengeable under § 11501(b)(4).[1]

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[1] None of the selected portions of the 4-R Act's legislative history, upon which respondents rely, provides meaningful support for their interpretation. That the States persuaded Congress to preserve their authority to provide discriminatory property tax exemptions that cannot be challenged under § 11501(b), Resp. Br. 50-52, tells us nothing about whether Congress also preserved the States' authority to provide discriminatory non-property tax exemptions. Respondents concede, through their silence, that the States never even asked to preserve their power to employ discriminatory non-property tax exemptions. Respondents appear to be arguing that because the States got what they asked for with respect to property tax exemptions, this Court should also protect non-property tax exemptions, even though they never asked for it. Also, whether members of Congress were thinking about "in lieu taxes," and

3. Contrary to respondents' argument, petitioner's interpretation does not produce "entirely different meanings [of the phrase 'another tax that discriminates'] depending on the type of tax being considered: property or non-property." See Resp. Br. 32. In petitioner's view, "another tax that discriminates" has a single meaning: any tax not specifically authorized in subsections (b)(1)-(3) that discriminates against railroads (even if by exempting railroad competitors) is subject to challenge under subsection (b)(4). It is true that, under *ACF Industries*, if a property tax discriminates against a railroad by exempting non-railroad property, it cannot be challenged under subsection (b)(4) if it has been authorized under (b)(1)-(3) (unless the tax singles out railroads). But that is not because the meaning of subsection (b)(4) changes for property and non-property taxes. It is because, as *ACF Industries* makes clear, the meaning of "another tax" in subsection (b)(4) excludes a property tax from which others are exempt to the extent such a tax has been authorized in subsections (b)(1)-(3).

Respondents contend otherwise—that petitioner's view creates "a chameleon statute," Resp. Br. 33—only because respondents erroneously believe that in *ACF Industries* this Court read the word "discriminates" in § 11501(b)(4) to exclude property tax exemptions. But, as demonstrated above, *ACF Industries* did not turn on the word "discriminate." This Court can give § 11501(b)(4) the meaning its plain language requires, and remain completely

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whether there was even a single understanding of what "in lieu taxes" referred to, does not matter. Even respondent is unwilling to argue "that subsection (b)(4)'s 'another tax' language is limited solely to in lieu gross receipts taxes." *Id.* at 55.

faithful to its construction of that provision in *ACF Industries*.

## II. THE "OTHER CONSIDERATIONS" IN *ACF INDUSTRIES* DO NOT COMPEL THE CONCLUSION THAT NON-PROPERTY TAX EXEMPTIONS FAVORING A RAILROAD'S COMPETITORS ARE NOT CHALLENGEABLE UNDER § 11501(b)(4).

This Court's textual and structural analysis fully and independently supported the ruling in *ACF Industries*. As discussed above, the same textual and structural analysis fully and independently supports the conclusion that non-property taxes imposed on railroads from which the railroad's competitors are exempt are challengeable as "another tax that discriminates against a rail carrier." Nonetheless, this Court pointed to three "[o]ther considerations" that "reinforce[d]" this Court's textual and structural analysis. *ACF Indus.*, 510 U.S. at 343. Nothing in *ACF Industries* suggests that any or all of those "considerations" would have been weighty enough to overcome the conclusion compelled by the text and structure of the statute. Thus, even if those "considerations" supported respondents' interpretation of § 11501(b)(4) here, which, as discussed below, they do not, they could not "compel[]" this Court to ignore what the text and structure of the statute so clearly require. See Resp. Br. 34-35.

1. It is true that like subsections (b)(1)-(3), subsection (b)(4) "does not speak with any degree of particularity to the question of tax exemptions." *ACF Indus.*, 510 U.S. at 343. But that consideration took on significance in *ACF Industries* only in light of the fact that Congress addressed discriminatory property tax rates and assessment ratios in detail in subsections (b)(1)-(3), and especially in light of the

fact that Congress had, in § 11501(a), specifically excluded property tax exemptions from the comparison class for subsection (b)(1)-(3) claims. *Id.* This consideration has little or no significance when dealing with the question whether selective exemptions in *non-property* taxes are challengeable under § 11501(b)(4), especially because Congress has nowhere expressly excluded exemptions from the comparison class for non-property discrimination claims.

Subsection (b)(4) was a late addition to the statute, put in as a catchall to ensure that the basic purpose of protecting railroads from discriminatory taxes would not be easily evaded by whatever sort of non-property discriminatory tax a State might impose. *Richmond, Fredericksburg & Potomac R.R.* v. *Dep't of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373-74 (5th Cir. 1987); *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981); *S. Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983). "[T]he whole value of a generally phrased residual clause ... is that it serves as a catchall for matters not specifically contemplated." *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2191 (2009). There is no reason to doubt that when Congress used the word "discriminates" in the catchall, it meant discrimination in all the forms it could take, including through exemptions (that had not been authorized). See *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803 (1989) (exemption for retirement benefits provided by state but not for retirement benefits provided by federal government falls within Congress's prohibition of discriminatory taxes on federal government employees by a state).

That subsection (b)(4) does not speak with particularity about tax exemptions is a strength of this catchall provision, not a reason to weaken it.

Respondents urge this Court not to allow railroads to challenge taxes that discriminate against them by exempting their competitors because such claims would require courts to evaluate a number of other issues to determine whether, in fact, such a tax unlawfully discriminates against railroads. Resp. Br. 36. This is true, but on that logic the Court would not enforce anti-discrimination laws in civil rights and other contexts. Congress chose to prohibit non-property taxes that discriminate against railroads in whatever guise they take.

Moreover, questions like what is the proper comparison class under subsection (b)(4) and what, if anything, might justify facially discriminatory tax treatment will not go away even if this Court were to misread the statute to authorize States freely to exempt railroad competitors from non-property taxes imposed on railroads. If a State imposed a higher tax rate on railroad use of fuel than others pay, even the State would have to concede that such a tax would be subject to challenge under subsection (b)(4); otherwise, the catchall becomes a nullity. And, a railroad challenge to a differential tax rate will still present a complicated set of questions for the court to decide before it can declare the discrimination to be unlawful. The issues are no more difficult in the exemption context than they are in the differential rate context.

2. Respondents also emphasize that, like property tax exemptions, sales and use tax exemptions were prevalent when Congress adopted § 11501(b). *Id.* at 39-41. But, once again, to the extent the prevalence of property tax exemptions played any role in this

Court's ruling that States retained the authority to provide *property* tax exemptions that discriminate against railroads, it did so based on Congress' "silence on the subject ... in light of the explicit prohibition of tax rate and assessment ratio discrimination," *ACF Indus.*, 510 U.S. at 344, and especially in light of the fact that Congress had, in § 11501(a), specifically excluded property tax exemptions from the comparison class for subsection (b)(1)-(3) claims. This reasoning does not extend to *non-property* tax exemptions because Congress never dealt with non-property tax discrimination with precision, and could not have done so given that it was trying to enact an inclusive ban on discrimination.

3. Finally, respondents invoke a steroid-laced version of the "principles of federalism," at odds with the way this Court invoked federalism in *ACF Industries*. Compare Resp. Br. 41-44, with *ACF Indus.*, 510 U.S. at 345. Respondents argue that principles of federalism require that this Court be "'*absolutely certain* that Congress intended' to preempt a State's ability to grant exemptions from its sales and use taxes." Resp. Br. 42 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991)). In *ACF Industries*, this Court said that "[w]hen determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, *we are hesitant to extend the statute beyond its evident scope*." 510 U.S. at 345. The statute's scope, with respect to property tax exemptions, was clear: Congress expressly preserved the States' power to employ them freely, even if doing so discriminated against railroads. That is why principles of federalism "compel[led]" the Court not to read the non-specific subsection (b)(4) to take that power away from the States.

Here, as should be apparent by now, the statute's scope and purpose with respect to non-property taxes is equally clear. The desire to interfere with the States' sovereign taxing authority could not be stated more plainly. The first paragraph of § 11501(b) expressly declares that Congress is setting forth taxing acts that the States "may not do." And, when addressing non-property taxing acts, Congress used the broadest language possible. The "clear and manifest purpose of Congress," then, was to permit challenges to state non-property taxes imposed on railroads but that discriminate against them by exempting their competitors. *ACF Indus.*, 510 U.S. at 345 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

## III. RESPONDENTS' VARIOUS OTHER ARGUMENTS ARE BEYOND THE SCOPE OF THE QUESTION PRESENTED.

As noted earlier, the question this Court agreed to review is narrow because the holding below was limited, although devastating to the railroad industry. See, generally, Brief of *Amicus Curiae* Association of American Railroads. The Eleventh Circuit held that, under *ACF Industries*, a state is as free to employ discriminatory non-property tax exemptions as it is to employ discriminatory property tax exemptions and that the railroads are barred as a matter of law from bringing a challenge under § 11501(b)(4). That threshold basis for defeating petitioner's claim avoided all of the other issues necessary to determine whether a tax unlawfully discriminates against a railroad, such as what is the proper class against which the treatment of the railroad should be measured, and whether a court should consider the individual tax being challenged

or some broader understanding of a state's entire tax scheme.

The petition for certiorari, brief in opposition and the *amicus* brief of the United States at the certiorari stage provided this Court with various proposed questions presented that would either limit this Court's review to the narrow, threshold ruling of the court of appeals or open this Court's review to the broader range of issues regarding how to determine what is unlawful discrimination. Compare Pet. i, with Brief in Opp. i, with Brief for the United States as *Amicus Curiae* I. This Court adopted *verbatim* the United States' proposed question, which focused exclusively on the narrow, threshold ruling of the court of appeals. *CSX Transp.* v. *Ala. Dep't of Revenue*, No. 09-520 (U.S. June 14, 2010) (specifying question presented). Petitioner did not object to that formulation, but respondents argued vigorously for a broader scope. Supplemental Brief of Respondents 7-13. This Court rejected respondents' suggestion. Nonetheless respondents stray beyond the narrow issue before the Court, asking this Court to opine on issues that this Court has expressly determined it will not consider at this time.

1. Two such issues merit only passing notice. First, respondents urge this Court to declare that § 11501(b)(4) requires consideration not only of the tax imposed on the railroad, but also of "the taxes paid by the railroads' competitors on the same taxable event when judging" whether a tax discriminates against railroads. Resp. Br. 59. As the United States urges, this Court should decline the invitation to reach this issue. U.S. Br. 25-26. Nonetheless, petitioner notes that lower courts have acknowledged that courts are ill equipped to evaluate the relative burdens of a state's entire tax scheme on various

taxpayers. *Burlington N. R.R.*, 932 F.2d at 1187-88; *Kan. City S. Ry.*, 817 F.2d at 377-78. And respondent's own brief demonstrates the complexity of evaluating a state's *entire* tax scheme by conspicuously excluding the impact of county taxes on a railroad's overall tax liability in this case. Compare Resp. Br. 16, with Pet. Br. 6-7.

Second, respondent argues that the 4-R Act provides no basis for a federal district court to order relief for a tax that discriminates against railroads by exempting its competitors. Resp. Br. 37-39 (citing 49 U.S.C. § 11501(c)). While petitioner welcomes the opportunity to litigate that issue eventually, it is manifestly premature to be arguing over the scope of the permissible remedy for a State's violation of the Act when the complaint was dismissed on the pleadings.

2. The most systematic effort to force this Court to reach beyond the question presented merits a lengthier response in part because it is disguised as if it is included within the question presented. Respondents contend that non-property tax discrimination against railroads is challengeable under § 11501(b) only when the discrimination favors "local businesses." *Id.* at 29. This is clearly a question concerning the scope of the comparison class. Respondents are arguing that the effects of a tax on a railroad should be compared only with the effects of the tax on local businesses, and not other interstate carriers. The scope of the comparison class in a claim under subsection (b)(4) is an issue for consideration on remand. Accordingly, the Court should decline to consider it. Nonetheless, respondents have attempted to intertwine this issue with the actual question presented by urging the Court to decide more broadly the precise meaning of the word "discriminates" in

§ 11501(b). *Id.* at 19, 25-31. Because it is presented as an alternative basis for affirmance, petitioner will discuss the issue in some detail.

To begin, respondents cite no court that has ever adopted this surprising limitation on the scope of § 11501(b), and petitioner is unaware of any. Reading the word "discriminates" to mean only discrimination that favors local business, not discrimination that favors a railroad's competitors, is certainly not the most natural reading of "any" "tax that discriminates against a rail carrier." Though respondents never acknowledge it in their brief, it would mean that even a single tax that imposes one rate on railroads and a lower rate on all of its interstate competitors would not be a tax that "discriminates against a rail carrier" within the meaning of subsection (b)(4). This of course would neuter the protections of the 4-R Act's catchall provision by rendering it largely a catch-nothing provision.

The opening paragraph of § 11501(b) states that "[t]he following acts unreasonably burden and discriminate against interstate commerce, and a State ... may not do any of them." As the text makes plain, Congress is declaring that certain acts unreasonably burden and discriminate against interstate commerce. One of the "acts" that follows is described in subsection (b)(4): "[i]mpos[ing a non-property] tax that discriminates against a rail carrier." Put together, the opening paragraph and subsection (b)(4) combine to mean that the "act" of imposing a discriminatory non-property tax on railroads is what Congress has decided to prevent a state from doing because such discrimination against railroads burdens and discriminates against interstate commerce.

The focus of the text of the operative part of the statute—the part that actually describes what is forbidden—is tax discrimination against *railroads*. Nothing in the text authorizes or requires a court to decide whether Congress was correct in concluding that the prohibited forms of tax discrimination against railroads have the effect of discriminating against interstate commerce. That is a decision that Congress has already made.[2] All a court need do is determine whether the tax under scrutiny discriminates against *railroads*.

What the text makes plain is hardly surprising given the motivation behind the 4-R Act. At the very outset of Congress's investigation into the burdens of state taxation on commerce, Congress was concerned with "the relative tax burdens on truck, air, bus, pipeline, water, and railroad carriers." S. Rep. No. 87-445, at 449 (1961). The need for "remedial national legislation" was born of the concern that railroads (and pipelines) bore a heavier burden of state taxation than their interstate carrier competitors. *Id.* at 451. Discriminatory tax burdens that states imposed among different interstate carriers was from the outset part of what Congress deemed to be discrimination against interstate commerce. This only makes sense because Congress was trying to shore up the railroad industry that was failing economically in part because of its inability to compete against other carriers. Pub. L. No. 94-210, § 101(a), (b)(2), 90 Stat. 31, 33 (1976) (ensuring that the railroad "mode of transportation will remain

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[2] The original version of what is now the opening paragraph of § 11501(b) is even more clear. It provides that "any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." JA 25.

viable in the private sector of the economy," and promoting Congress's policy of "foster[ing] competition among all carriers by railroad and other modes of transportation"). In sum, a non-discriminatory state taxing regime among railroads and its interstate carrier competitors is part of the non-discriminatory playing field between railroads and other interstate carriers that Congress was promoting.

It is hardly surprising, then, that no court presented with a railroad challenge to a tax that favors its direct competitors has concluded that such a challenge fails because the tax does not favor local businesses. *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999); *Burlington N. R.R.* v. *Comm'r of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W. 2d 338 (Iowa 1983). Not even the Eleventh Circuit, which concluded that the tax under review was not challengeable under § 11501(b)(4), ever suggested that the tax should survive because it favors a railroad's interstate competitors and not local businesses. In sum, the issue is not presented here, and if it were the Court would rightly reject respondents' position.

## CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings .

Respectfully submitted,

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# SUPPLEMENTAL BRIEF

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No. 09-520

In the
**Supreme Court of the United States**

CSX TRANSPORTATION, INC.,
*Petitioner*,
v.
ALABAMA DEPARTMENT OF REVENUE AND
TIM RUSSELL, COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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# SUPPLEMENTAL BRIEF OF RESPONDENTS

In Alabama, railroads pay the same State tax rate as other commercial and industrial businesses that use diesel fuel off-road. Railroads currently pay 36% *less* in State taxes per gallon of diesel fuel than commercial and industrial businesses that use diesel fuel on-road—including the railroads' primary competitor, motor carriers. The United States asks the Court to grant review but then ignore these facts, even though it agrees with Alabama that these facts could be dispositive of CSX's discrimination claim.

The United States identifies three primary questions in this case:

- *Threshold/Cognizability*: Is a State's generally applicable sales-and-use tax subject to invalidation under subsection (b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), codified at 49 U.S.C. § 11501(b)(4), because it exempts one or more of a railroad's competitors?

- *Scope of Review*: Can a federal court review the State's overall tax structure when judging a railroad's discrimination claim under subsection (b)(4)?

- *Ultimate/Discrimination*: If a State's generally applicable sales-and-use tax can violate subsection (b)(4), does Alabama's sales-and-use tax on diesel fuel discriminate against CSX?

U.S. Br. 10, 17-18. The United States recommends the Court grant review and reverse on the threshold cognizability question; it agrees with Alabama on the scope-of-review question; and, it asks the Court to avoid the ultimate question of discrimination. U.S. Br. 17-20.

Above all, the Eleventh Circuit's decision was correct, and certiorari review is unwarranted on the threshold cognizability question. *See infra* Part I. That said, in Part II, we demonstrate why it is imperative that, if the Court grants review and agrees with CSX on the threshold question, the Court explicitly agree with Alabama and the United States that "in resolving a claim of unlawful tax discrimination under Subsection (b)(4), a court should consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers," U.S. Br. 17, before either deciding or remanding the ultimate question.

## 1. The Court Should Deny Certiorari Review.

Certiorari review is not warranted on the threshold cognizability question for three primary reasons. First, the Ninth and Eleventh Circuits correctly applied the Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), an opinion the Eighth Circuit essentially ignores. BIO 3-8. Second, the two-to-one circuit split is shallow. Third, Alabama is not discriminating against CSX; thus, reversal on the threshold question will not change the ultimate outcome of this case. BIO 8-10. We do not rehash these points here. Instead, Alabama addresses four issues arising from the United States' brief.

1. *The Eleventh Circuit's Opinion*: We do not counter the United States' criticism of the Eleventh Circuit's opinion in detail here. *See* U.S. Br. 11-15. Suffice it to say, we believe the United States is mistaken on several counts.

But we must make one point: The 4-R Act's fundamental inquiry—*i.e.*, whether railroads are placed on equal footing with other commercial and industrial businesses—should not change depending on whether courts are reviewing property or non-property taxes.[1] The 4-R Act expresses no such distinction.

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[1] Similarly, the proper comparison class for subsection (b)(4) claims against property and non-property taxes is commercial and industrial taxpayers, not a hand-picked competitor.

In *ACF*, the Court held that a State property tax is not subject to "invalidation" under subsection (b)(4) as long as the tax is "generally applicable." *ACF*, 510 U.S. at 340. In other words, when a State *property* tax is at issue, the 4-R Act does not allow the railroads to complain that a State's generally applicable tax discriminates against them simply because a competing interstate carrier (in *ACF*, the motor carriers) received an exemption from the tax.

Yet, like CSX, the United States contends that when a generally applicable *non-property* tax is challenged on the grounds that "competing transportation providers are exempt," the tax "is subject to challenge under 49 U.S.C. 11501(b)(4)." U.S. Br. 14. But neither the United States nor CSX points to the language that transforms subsection (b)(4) from the railroads' shield against being singled out vis-à-vis commercial and industrial businesses with regard to property taxes into a sword that (potentially) bestows most-favored-carrier status upon railroads when reviewing non-property taxes. They cannot do so because nothing in subsection (b)(4)'s language suggests this odd dichotomy.

2. *The Shallow Split*: Like CSX, the United States relies on two State supreme court cases, both from inside the Eighth Circuit, to bolster the two-to-one split among the federal circuits. See U.S. Br. 16.

*Atchison, Topeka, & Santa Fe Railway v. Bair*, 338 N.W. 2d 338 (Iowa 1983), which predates this Court's opinion in *ACF* by 11 years, sheds no light on

the question of whether a generally applicable sales-and-use tax is subject to challenge under the 4-R Act because some exemptions exist. The Iowa tax in question was not generally applicable; it was a "special excise tax on railroads." *Id.* at 341. Here, the Eleventh Circuit acknowledged that its decision would have been different if the tax in question singled out the railroads. Pet. App. 32a-34a. Accordingly, the *Bair* decision is inapposite.

In *Burlington Northern Railroad Company v. Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000), the State court did consider the railroad's challenge to Minnesota's generally applicable sales-and-use tax on diesel fuel. But the United States wrongly asserts that the State court "concluded that the taxes in question were invalid." U.S. Br. 9. To the contrary, the Supreme Court of Minnesota rejected the railroad's discrimination claim because "rail carriers and barges pay the same tax on fuel" and "this tax is significantly less than the fuel tax paid by their primary competitors, motor carriers." *BNRR*, *supra*, at 61.

Seven years later, the Eighth Circuit considered the same Minnesota tax structure. *See Union Pacific R.R. Co. v. Minnesota Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007). That court reached the opposite conclusion because binding circuit precedent "precluded the district court from considering the excise tax the motor carriers and airlines pay on fuel in making its determination." *Id.* at 695. In other words, in Minnesota alone, an outcome-determinative split exists between federal and state

courts on the scope-of-review issue upon which the United States and Alabama agree and which CSX seeks to avoid.

3. *Future Vehicle*: If the Court wishes to let this issue percolate, a future vehicle awaits in the Sixth Circuit. *See* U.S. Br. 16, n.16 (citing *Ill. Cent. RR. Co. v. Tenn. Dep't of Rev.*, No. 3:10-cv-197 (M.D. Tenn. filed Feb. 26, 2010)). In line with the railroads' nationwide litigation strategy outlined *infra* at 7-11, ICRR challenges its payment of Tennessee's sales-and-use tax on diesel fuel because motor carriers are exempt from sales-and-use tax; they instead pay Tennessee's motor fuels tax. *See ICRR*, *supra*, Complaint 3-5. In fact, ICRR's complaint was filed by the same attorneys who represented CSX below and is, in many parts, identical to CSX's complaint against Alabama. The ICRR proceedings are currently stayed pending this Court's decision on this petition. *See id.*, Order Granting Joint Motion to Stay Proceedings, Doc. 12.

4. *The Question Presented*: The United States proposes changing the wording of the question presented. *See* U.S. Br. 19-20. While we disagree with the United States' arguments for cabining this Court's review should the petition be granted, *see infra* Part II, we agree that the United States more accurately frames the threshold question than does CSX. As the United States correctly notes, CSX seeks to enjoin Alabama's sales-and-use tax, not its exemptions.

## II. If the Court Grants Review and Agrees with CSX on the Threshold Question, It Should Also Agree with Alabama and the United States that Courts Reviewing a Subsection (b)(4) Claim Can Review a "State's Overall Taxing Regime."

Should the Court grant review and agree with CSX on the threshold cognizability issue, the United States (1) agrees with Alabama that courts reviewing a subsection (b)(4) claim can "consider the State's overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers" but (2) recommends the Court remand the case to determine whether Alabama is discriminating against CSX. U.S. Br. 17-20. We disagree with the United States' contention that this Court cannot presently rule that Alabama is not discriminating against CSX. *See infra* at 12-13. But we begin by explaining why it is imperative that, should the Court rule with CSX on the threshold issue, this Court explicitly agree with Alabama and the United States on the scope of review.

1. *Scope of Review*: In a nutshell, the railroads are attempting to avoid State taxation on diesel fuel by conflating differentiation with discrimination. *See* U.S. Br. 15-16 (citing similar 4-R Act challenges against seven States' taxation of diesel fuel). The railroads' claims are predicated on the dual-nature of diesel fuel taxation, a duality encouraged by federal law.

The United States imposes a 24.3¢ per gallon tax on diesel fuel, 26 U.S.C. §4082(a)(2), but exempts from taxation diesel fuel that is "designated for off-road use under 26 U.S.C. §4082—which is what locomotives burn." U.S. Br. 6. In other words, motor carriers operate on-road and pay the federal motor fuels tax; railroads operate off-road and do not pay the federal motor fuels tax. To enforce this on-road/off-road tax distinction, federal law provides that diesel fuel used for off-road purposes must be "indelibly dyed by mechanical injection in accordance with regulations which the Secretary shall prescribe." 28 U.S.C. §4082(a)(2).

The States have embraced the differentiation between clear (on-road) and dyed (off-road) diesel fuel. Like the federal government, all 50 States charge a motor fuel excise tax for on-road, clear diesel fuel—*i.e.*, the diesel fuel used by the railroads' primary competitors, motor carriers.[2] As far as we have been able to tell, no State charges the same motor fuel tax on the railroads' use of off-road, dyed diesel fuel. Instead, the vast majority of States, including Alabama, tax the sale and/or consumption of dyed diesel fuel under the States' generally applicable "sales-and-use" or "gross receipts" excise taxes.[3]

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[2] *See* Federation of Tax Administrators, *State Motor Fuel Tax Rates*, *available at* http://www.taxadmin.org/fta/rate/mf.pdf (charting the January 1, 2010 motor fuels tax rates for all 50 States) (last visited May 20, 2010).

[3] *See* Federation of Tax Administrators, *State Sales Tax Rates*, *available at* http://www.taxadmin.org/fta/rate/sales.pdf (charting the January 1, 2010 State sales tax rates, but not the States' gross receipts tax rates) (last visited May 20, 2010).

To prevent double taxation, the States generally exempt the payers of the motor fuel excise tax on clear diesel fuel, including motor carriers and individual citizens, from additionally paying sales-and-use excise tax on the same purchase. And we have been doing so for a very long time. *See, e.g.*, John F. Due & John L. Mikesell, *State Taxation*, 77 (1983) ("Gasoline and, in most, but not all, cases, other motor fuels subject to the motor fuel tax are exempt from sales tax in all but seven states").

Alabama, for example, levies a 19¢ per gallon motor fuel excise tax on clear (on-road) diesel fuel and the State's generally applicable 4% sales-and-use excise tax on dyed (off-road) diesel fuel. BIO 1-2. With diesel fuel currently retailing at around $3.00 per gallon, railroads pay 12¢ in State taxes per gallon of diesel fuel—7¢ per gallon *less* than motor carriers and individual citizens pay.[4]

Yet, CSX has seized on this on-road/off-road distinction to support its subsection (b)(4) claim. CSX's claim is nothing new. A quick review of the cases cited by the United States at pp. 15-16, which span lawsuits against seven States, reveals that *every* subsection (b)(4) claim by the railroads has cited the motor carriers' exemption from paying the State's sales-and-use tax on diesel fuel as

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[4] Diesel fuel retailed at $3.02 per gallon in the Gulf Coast States in April 2010, the first month this year in which diesel costs exceeded $3.00 per gallon. *See* U.S. Energy Information Administration, *Weekly Retail Gasoline and Diesel Prices*, *available at* http://www.eia.doe.gov/dnav/pet/pet_pri_gnd_dcus_r30_m.htm (last visited May 20, 2010).

discriminatory. And, in every case, the motor carriers were instead paying the State's motor fuels tax on clear diesel fuel—a tax *not* being paid by the railroads.

The railroads' strategy of attacking the States' sales-and-use taxes in this manner explains CSX's desire to limit the Court's review to the threshold cognizability question. Reply Br. 2-3. What CSX wants—and *all* CSX wants—is for this Court to open the door to these claims nationwide. CSX wants to prevent the Court from addressing whether the motor carriers' payment of the more expensive motor fuels tax on diesel fuel impacts—or, as we believe, destroys—CSX's discrimination claim. And with good reason. Any decision that remands this case without offering the lower courts guidance on how to review the railroads' subsection (b)(4) claims will subject the States to an onslaught of costly 4-R Act litigation like the case currently stayed in Tennessee, in which the motor carriers' sales-and-use tax exemption is not only the primary, but the sole, basis for the railroad's subsection (b)(4) claim. *See ICRR*, *supra*, Complaint 4-5, ¶17-23.

Even worse, if any lower courts follow the Eighth Circuit's "unduly narrow" rule that the States' tax codes must be viewed with blinders when reviewing subsection (b)(4) claims, U.S. Br. 17, n.8, the railroads' claims could strip States of vital tax revenues. To date, neither Minnesota nor Missouri has rewritten its tax code to recapture the millions of dollars in revenue lost due to the Eighth Circuits' 2007 and 1999 opinions. *See UPRR*, 507 F.3d 693

(Minnesota); *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984 (8th Cir. 1999) (Missouri). In Alabama, a similar adverse ruling would remove millions of dollars from our public schools. *See* Ala. Code §§ 40-23-35, -85 (depositing sales-and-use tax proceeds into Alabama's Education Trust Fund).

For these reasons, even if the Court agrees with the United States that remanding the ultimate discrimination question is preferable, the Court should at least address the purely legal, nationally important issue of whether a court can review a State's "overall taxing regime rather than focusing solely on the tax provision that applies to rail carriers." U.S. Br. 17. The United States did not ask the Court to avoid this penultimate legal question. In fact, the United States has openly advocated that courts review a State's entire tax structure under subsection (b)(4) since at least 1993. *See* Brief for the United States as *Amicus Curiae* at 21-22, *ACF*, *supra* (No. 92-74) ("[A] State may be able in a particular case to justify a specific tax exemption by showing that the exempt property is subject to alternative [S]tate or local taxes that are not levied against railroads.") (footnote omitted).[5]

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[5] Here, the question would be whether, when judging CSX's discrimination claim, the Court may consider (a) both of Alabama's excise taxes on diesel fuel (*i.e.*, motor fuels, *see* Ala. Code § 40-17-1 *et seq.*, and sales-and-use, *see* Ala. Code § 40-23-1 *et seq.*) or (b) just the challenged sale-and-use tax.

2. *The Ultimate Question:* While Alabama and the United States agree on the scope of review for subsection (b)(4) claims, we disagree on whether the Court can and should apply it to the ultimate question here—a question, to be clear, that we believe will be unnecessary to answer because CSX's claim is not cognizable under subsection (b)(4).

This Court can affirm a lower court's decision for any reason, even if not the reason given by the lower court. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason."). We agree with the United States that "the ultimate question of discrimination necessarily entails a factual inquiry." U.S. Br. 18. But, contrary to the United States' implication, *id.*, the facts necessary to reject CSX's claim (the amount of taxes paid on diesel fuel by CSX, their competitors, and other commercial and industrial businesses) are settled. In fact, CSX has acknowledged this agreement to the Court: "The parties stipulated to all relevant facts." Pet. 5 (citing 11th Cir. Expanded Record Excerpts ("ERE") No. 12.).

Accordingly, CSX's claim was ripe to be summarily dismissed as meritless for the reasons outlined in our Brief in Opposition at pp. 8-10, just as the Supreme Court of Minnesota and both panels of the Eighth Circuit reached the ultimate question of discrimination on summary judgment orders because no outstanding material issues of fact

existed in those cases either. *See UPRR*, 507 F.3d at 694-96; *Lohman*, 193 F.3d at 985; *BNRR*, 606 N.W.2d at 55-57.

* * *

In summary, certiorari review is unwarranted because the two-to-one circuit split is shallow and the Eleventh Circuit falls on the correct, majority side of the split. If review is granted, we will argue for affirmance both on the threshold cognizability issue and on the alternative ground that judgment was proper because Alabama is not discriminating against CSX. And regardless of whether the Court addresses the ultimate question of discrimination, the Court should explicitly agree with Alabama and the United States that a States' entire tax structure—not just the provision being challenged—must be considered when judging a discrimination claim under subsection (b)(4).

## Conclusion

The Court should deny the petition for a writ of certiorari.

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# AMICUS CURIAE BRIEF

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# In the Supreme Court of the United States

CSX TRANSPORTATION, INC., PETITIONER

*v.*

ALABAMA DEPARTMENT OF REVENUE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## QUESTION PRESENTED

Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier."

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# In the Supreme Court of the United States

No. 09-520

CSX TRANSPORTATION, INC., PETITIONER

*v.*

ALABAMA DEPARTMENT OF REVENUE, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

This case concerns Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 54 (49 U.S.C. 11501). The United States has an interest in the proper application of this statute to preclude the imposition of discriminatory taxes on rail carriers. The Department of Transportation is charged with, *inter alia*, overseeing rail safety, 49 U.S.C. 20103 (2000 & Supp. IV 2004), and administering various railroad financial assistance programs. The Surface Transportation Board—an independent federal agency with responsibility for the economic regulation of the Nation's railroads, 49 U.S.C. 721—is charged with fostering economic conditions that allow rail carriers to earn adequate revenues. At the

invitation of this Court, the United States filed a brief as amicus curiae at the petition stage of this case.

## STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the 4-R Act to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." 4-R Act § 101(a), 90 Stat. 33; see *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

The 4-R Act targets discriminatory state taxation as a particular cause of decline in the rail industry. See 4-R Act § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007).[1] After long study, Congress found that certain forms of state taxation of rail carriers "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). To protect these important channels of interstate commerce, Congress crafted an

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[1] Section 306 of the 4-R Act, 90 Stat. 54, has been repeatedly recodified and rephrased without substantive change. It was originally codified at 49 U.S.C. 26c (1976). It was then recodified in 1978, with a slight change in language, at 49 U.S.C. 11503 (1994), as part of the enactment into positive law of Title 49. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. That restatement of prior law was "without substantive change." *Id.* § 3(a), 92 Stat. 1466; *Burlington N. R.R.*, 481 U.S. at 457 n.1; cf. *Kawasaki Kisen Kaisha Ltd.* v. *Regal Beloit Corp.*, 130 S. Ct. 2433, 2446-2447 (2010). In 1995, the provisions of Section 11503 were again reenacted without substantive change but renumbered as Section 11501, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission (ICC) and created the Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. Accordingly, this brief refers throughout to the current codification of Section 306 at 49 U.S.C. 11501. See Sup. Ct. R. 34.5.

exception to the Tax Injunction Act, 28 U.S.C. 1341, empowering federal courts to enjoin prohibited forms of state taxation. 49 U.S.C. 11501(c).

Section 11501(b) of Title 49 describes several types of prohibited state taxation.[2] Subsections (b)(1)-(3) specifically address ad valorem property taxes; those provisions bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property relative to "other commercial and industrial property." The phrase "commercial and industrial property" is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. 11501(a)(4). Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. *See CSX Transp.*, 552 U.S. at 16, 18 (referring to "objective benchmark[s]" underlying "the comparison of ratios the statute requires" in Subsections (b)(1)-(2)); *Burlington N. R.R.*, 481 U.S. at 461 (rejecting as "untenable" the view that a claim under Subsection (b)(1) requires proof of intentional discrimination).

A separate catch all provision, 49 U.S.C. 11501(b)(4), broadly prohibits States from imposing "another tax that discriminates against a rail carrier." As originally enacted, this provision proscribed "any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." 4-R Act § 306, 90 Stat. 54. By its

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[2] The 4-R Act prohibits "a State, subdivision of a State, or authority acting for a State or subdivision of a State" from engaging in any of the specified forms of discriminatory taxation. 49 U.S.C. 11501(b). Because the record in this case focuses primarily on Alabama's taxation scheme (*see* p. 5 n.3, *infra*), this brief refers generally to the State or the States as the acting party.

terms, Subsection (b)(4) reaches beyond the ad valorem property taxes addressed in the preceding provisions "to prevent discriminatory taxation of a railroad carrier by any means." *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

2. Alabama imposes four-percent sales and use taxes on the retail sale, storage, use, or consumption in Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (LexisNexis Supp. 2009) (sales tax), *id.* § 40-23-61(a) (LexisNexis 2003) (use tax). Although the sales and use taxes are generally applicable, state law expressly exempts fuel for use by vessels engaged in interstate or foreign commerce. *Id.* § 40-23-4(a)(10) (LexisNexis Supp. 2009) (exemption from sales tax), *id.* § 40-23-62(12) (LexisNexis Supp. 2009) (exemption from use tax). Consequently, water carriers engaged in interstate or foreign commerce typically do not pay tax to respondents on their motor fuel.

Alabama also imposes primary and additional excise taxes totaling 19 cents per gallon on the receipt of motor fuel, including diesel fuel. Ala. Code § 40-17-2(1) (LexisNexis 2003) (primary motor fuel excise tax), *id.* § 40-17-220(e) (LexisNexis Supp. 2009) (additional motor fuel excise tax). Motor fuel subject to the primary excise tax is exempt from the sales and use taxes. *Id.* § 40-17-2(1) (LexisNexis 2003). On-road motor carriers therefore typically pay an excise tax of 19 cents per gallon of fuel to respondents, and they do not pay a sales or use tax on their fuel.

Fuel used in railroad locomotives is generally not subject to Alabama's motor fuel excise taxes. That is because dyed diesel fuel designated for off-road use under 26 U.S.C. 4082—which is what locomotives burn—is exempt from Alabama's primary motor fuel excise tax. Ala.

Code § 40-17-2(1) (LexisNexis 2003). In addition, railroad locomotive fuel is expressly exempted from Alabama's additional motor fuel excise tax. *Id.* § 40-17-220(d)(2) (LexisNexis Supp. 2009). Consequently, railroads (along with other off-road diesel users and intrastate water carriers covered by similar excise tax exemptions) typically pay sales or use taxes of four percent to the State, and they do not pay an excise tax on their fuel.[3]

3. Petitioner, a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation Board, sued respondents Alabama Department of Revenue and its Commissioner in federal district court under the 4-R Act. Petitioner contended that, by requiring rail carri-

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[3] The foregoing describes only the state level tax scheme. Certain subdivisions of Alabama are authorized to levy and collect taxes. *See, e.g.*, Ala. Code § 11-3-11(a)(2) (LexisNexis 2008) (powers of county commissions include levying taxes), *id.* § 11-3-11.2 (LexisNexis 2008) (powers of county commissions include collecting local taxes), *id.* § 11-51-200 (LexisNexis 2008) (powers of municipal corporations include levying taxes). The record in this case appears to contain relatively little evidence regarding county or municipal taxes. *See* Pet. Br. 6-7 (discussing record evidence of cumulative tax rates in Mobile, Birmingham, and Montgomery). Petitioner has filed several state-court complaints for refund and notices of appeal with respect to these county and municipal taxes. *See, e.g.*, *CSX Transp., Inc.* v. *City of Mobile*, No. CV-2010-901129 (Mobile County Cir. Ct. filed May 20, 2010); *CSX Transp., Inc.* v. *Jefferson County*, No. CV-2010-01490 (Jefferson County Cir. Ct. filed May 20, 2010); *CSX Transp., Inc.* v. *City of Birmingham*, No. CV-2010-901772 (Jefferson County Cir. Ct. filed May 20, 2010); *CSX Transp., Inc.* v. *Montgomery County*, No. CV-2010-900648 (Montgomery County Cir. Ct. filed May 19, 2010); *CSX Transp., Inc.* v. *City of Montgomery*, No. CV-2010-900652 (Montgomery County Cir. Ct. filed May 19, 2010). Petitioner has also filed a state-court complaint for refund and notice of appeal with respect to the state sales and use taxes challenged in this case. *CSX Transp., Inc.* v. *State of Ala. Dep't of Revenue*, No. CV-2010-900645 (Montgomery County Cir. Ct. filed May 19, 2010).

ers to pay sales and use taxes from which motor carriers and water carriers are exempt, respondents had discriminated against petitioner in violation of 49 U.S.C. 11501(b)(4).

a. In July 2008, the district court granted petitioner's motion for a preliminary injunction against collection of the sales and use taxes. The court noted that respondents "ha[d] conceded that * * * 'no matter how the "comparison class["] is framed, [it] consists of motor carriers and water carriers.'" Pet. App. 12a (quoting Defs. Resp. to Req. for Inj. Relief 5). The court then held that "[b]ecause the direct competitors of the railroads do not pay diesel fuel taxes under Alabama law, * * * there is reasonable cause to believe that the [4-R] Act has been violated." *Ibid.* The district court also granted respondents' motion to stay further proceedings pending the Eleventh Circuit's decision in *Norfolk Southern Railway* v. *Alabama Department of Revenue*, No. 08-12712 (*Norfolk Southern*), in which a different rail carrier had brought a materially identical challenge to Alabama's sales and use taxes. Dkt. 19 (July 23, 2008).

b. In December 2008, the Eleventh Circuit announced its decision in *Norfolk Southern*, rejecting the rail carrier's challenge there. Pet. App. 13a-38a. The court of appeals in *Norfolk Southern* found the case to be controlled by this Court's holding in *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332, 340 (1994) (*ACF*), that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)." The Eleventh Circuit acknowledged that *ACF* involved property taxes rather than sales or use taxes. Pet. App. 29a. The court concluded, however, that this Court's analysis was "equally applicable" to the exemptions from sales and use taxes that were at issue in *Norfolk Southern*. *Ibid.*

In discussing *ACF*, the court of appeals focused on this Court's observations that Subsection (b)(4) does not specifically address discriminatory property tax exemptions, see 510 U.S. at 343; that property tax exemptions were ubiquitous when the 4-R Act was passed, see *id.* at 344; and that "concerns for state sovereignty" disfavored federal constraints on a State's property tax exemptions, see *id.* at 345. See Pet. App. 29a-31a. The court of appeals concluded that, because those observations were also applicable to sales and use tax exemptions, such exemptions could not be the basis for a discrimination claim under Subsection (b)(4). *Ibid.* The court stated that its holding aligned it with "other courts that also have applied [*ACF*'s] analysis to state and local taxes analogous to Alabama's." *Id.* at 31a; see *id.* at 31a n.14 (citing cases). The court of appeals acknowledged, however, that some courts have "scrutinized exceptions to generally applicable *non*-property taxes." *Id.* at 31a; see *id.* at 31a n.15 (citing cases).[4]

c. After the Eleventh Circuit issued its decision in *Norfolk Southern*, the district court in this case sua sponte entered an order dissolving its preliminary injunction and dismissing petitioner's suit. Pet. App. 3a. Petitioner ap-

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[4] The *Norfolk Southern* court stated that, although "a tax with widespread exemptions could indicate that a state has 'single[d] out' the railroad for discriminatory treatment," such was "not the case here." Pet. App. 32a (quoting *ACF*, 510 U.S. at 347) (brackets in original). The court also rejected the rail carrier's argument that respondents had unlawfully discriminated against rail carriers by "us[ing] the proceeds of the taxes levied on motor carriers to maintain roads [while] railroads do not receive similar subsidies." *Id.* at 35a. The court refused to "compare the sales and use tax to the fuel excise tax, insofar as there are differences in the ways in which their respective proceeds are spent." *Id.* at 36a. The court believed it to be inappropriate "to look past the particular tax at issue to analyze the overall state tax structure," *ibid.*, or to scrutinize "the use to which a state puts its tax revenue," *id.* at 37a.

pealed and, acknowledging that *Norfolk Southern* was controlling, sought initial hearing en banc. *Id.* at 2a & n.1. The court of appeals denied initial hearing en banc, *id.* at 39a, and a panel subsequently affirmed the district court's dismissal order in a per curiam decision resting on *Norfolk Southern*, *id.* at 1a-2a.

On June 14, 2010, this Court granted the petition for a writ of certiorari limited to the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as 'another tax that discriminates against a rail carrier.'"

## SUMMARY OF ARGUMENT

1. A state non-property tax that rail carriers are required to pay, but from which competing transportation providers are exempt, may run afoul of 49 U.S.C. 11501(b)(4) as "another tax that discriminates against a rail carrier." The word "discrimination" is ordinarily understood to mean the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *Black's Law Dictionary* 534 (9th ed. 2009). This Court has long recognized that selective tax exemptions granted to favored classes may constitute one form of economic discrimination against persons who are required to pay the taxes. Nothing in the structure or history of the 4-R Act suggests that Congress carved out one area of common tax policy, non-property tax exemptions, from scrutiny under Section 11501(b)(4). To the contrary, by its terms, Section 11501(b)(4) prohibits a State from imposing upon rail carriers any non-property tax that similarly situated economic actors are not required to pay unless the State can identify an acceptable justification for the disparate treatment.

2. This Court's decision in *ACF*, *supra*, is not controlling here. The *ACF* Court addressed Section 11501(b)(4)'s application to property taxes and did not comment on any other type of tax. The Court's analysis, moreover, rested primarily on structural inferences drawn from neighboring 4-R Act provisions that specifically address state property taxes and that manifest Congress's intent not to disturb state property tax exemptions. With respect to non-property taxes, by contrast, discrimination against rail carriers is governed solely by Section 11501(b)(4)'s catch-all provision. The principal reasons this Court gave for rejecting the plaintiff's 4-R Act claim in *ACF* are therefore inapplicable to this suit.

3. The Court should resolve the question on which it granted a writ of certiorari by holding that a state non-property tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under 49 U.S.C. 11501(b)(4). On remand, the lower courts can then determine whether the challenged taxes actually "discriminate" against petitioner.

## ARGUMENT

### A STATE NON-PROPERTY TAX PAID BY RAIL CARRIERS, BUT FROM WHICH COMPETING TRANSPORTATION PROVIDERS ARE EXEMPT, IS SUBJECT TO CHALLENGE UNDER 49 U.S.C. 11501(b)(4)

#### A. A State Non-Property Tax Paid By Rail Carriers Is "Another Tax" That May "Discriminate[] Against A Rail Carrier" Within The Meaning Of 49 U.S.C. 11501(b)(4) When Competing Transportation Providers Do Not Pay The Tax

The text, structure, and history of the 4-R Act support petitioner's view that a non-property tax paid by rail carriers, but from which competing transportation providers are exempt, is subject to challenge under 49 U.S.C. 11501(b)(4).

1. Section 11501(b) contains a four-part prohibition against discriminatory state taxation of railroads. The first three prohibitions (Subsections (b)(1) through (b)(3)) address only ad valorem property taxes and specifically forbid States from

> (1) [a]ssess[ing] rail transportation property at a value that has a higher ratio to [its] true market value * * * than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to [its] true market value * * * [;]
>
> (2) [l]evy[ing] or collect[ing] a tax [based on such] an assessment * * * [; and]
>
> (3) [l]evy[ing] or collect[ing] an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the assessment jurisdiction.

49 U.S.C. 11501(b)(1)-(3). The fourth prohibition, by contrast, provides that States may not

> [i]mpose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. 11501(b)(4).

A state tax that possesses the explicit, objective characteristics stated in Subsections (b)(1), (2), or (3) is discriminatory per se. Each of these subsections requires a comparison between the State's assessment or taxation of "rail transportation property" and its assessment or taxation of non-railroad "commercial and industrial property." Because the 4-R Act limits the term "commercial and industrial property" to property that is "devoted to a commercial or industrial use *and subject to a property tax levy*," 49

U.S.C. 11501(a)(4) (emphasis added), the statute makes clear that the relevant comparison is to commercial and industrial property "that is taxed," *Department of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 341-342 (1994).

The fourth prohibition (Subsection (b)(4)) is a catch-all provision that bars States from imposing "another tax that discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). Both the nature of the prohibition ("discrimination") and the description of the protected class ("rail carriers") are broader and more general than Subsections (b)(1)-(3). Unlike the preceding subsections, Subsection (b)(4) is not limited to property taxes, does not specify the appropriate comparison class, and does not include an objective test by which to measure discrimination. By its plain terms, Subsection (b)(4) is a general prohibition of tax discrimination against a rail carrier in any form and "by any means." *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); see *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 78 F.3d 438, 441 (9th Cir.) (*ATSF*) (Subsection (b)(4) "is designed to encompass all discriminatory state taxes."), cert. denied, 519 U.S. 1029 (1996); *Richmond, Fredericksburg & Potomac R.R.* v. *Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (Subsection (b)(4) "was intended as a catchall provision designed to prevent discriminatory taxation of a railroad carrier by any means.").

The statutory history confirms Subsection (b)(4)'s broad scope. Congress studied and debated discriminatory property taxation for 15 years before passing the 4-R Act, and during that time it devised finely calibrated rules about property taxation. *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 372-373 (5th Cir. 1987). Near the end of the legislative process, however, it became clear that "banning discriminatory property taxes was not enough to save the railroads from unfair state taxation." *Id.* at 373; see *Alabama*

*Great S. R.R.*, 663 F.2d at 1041. Congress thus included Subsection (b)(4) "to ensure that the statute would not fail of its broader purpose," and "to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections of § 1150[1](b)." *Kansas City S. Ry.*, 817 F.2d at 373-374; *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991) ("Subsection (b)(4) is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax," whether it be "an income tax, a gross-receipts tax, a use tax, an occupation tax * * * whatever."). Rather than attempt the impractical task of anticipating every tax scheme that could result in unjust discrimination against rail carriers, Congress enacted the broad prohibition that is now codified at 49 U.S.C. 11501(b)(4).

2. In addition to the specific forms of discrimination described in current Subsections (b)(1)-(3), the 4-R Act as originally enacted prohibited "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad." 4-R Act § 306, 90 Stat. 54. As this Court has often recognized, the word "any" has "an expansive meaning." *See, e.g.*, *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning.'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)); *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (holding that the phrase "'any other law enforcement officer' suggests a broad meaning" and citing cases).[5] Read naturally, Subsection (b)(4) broadly prohibits

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[5] The modest alterations in wording that have occurred since that time were not intended to effect any substantive change, see p. 2 n.1, *supra*, and current Subsection (b)(4)'s unqualified reference to "another tax that discriminates against a rail carrier" is in any event capacious.

States from imposing any tax that is not addressed in Subsections (b)(1)-(3) and "that discriminates against a rail carrier."

The statute does not define the term "discriminates." As this Court recently explained, "[w]hen terms in a statute are undefined," they should be given "their ordinary meaning." See *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2471 (2010) (quoting *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995)). The ordinary meaning of the word "discrimination" is the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *Black's Law Dictionary* 534 (9th ed. 2009); accord *Black's Law Dictionary* 420 (5th ed. 1979); *Richmond, Fredericksburg & Potomac R.R.*, 762 F.2d at 380 n.4 (citation omitted).

A state taxation scheme can discriminate against a disfavored class in a number of different ways. A taxing regime could, of course, be discriminatory because it taxes similarly situated persons at different rates. But discrimination can also be effected through differential tax bases, see, *e.g.*, *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 162-163 (1999) (different franchise tax bases for domestic and foreign firms); targeted tax deductions, see, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 327-328 (1996) (intangibles tax deductions based on percentage of business conducted within the State); tax credits, see, *e.g.*, *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 271 (1988) (tax credit against motor fuel sales tax to sellers of ethanol if produced in-state or in a State with reciprocal tax benefits); or any number of variations, see, *e.g.*, *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 324-325 (1977) (50 percent reduction in transfer tax rate for nonresident transactions involving domestic sale of securities, and limited tax liability for single transaction involving domestic sale).

A state taxation scheme can also discriminate against a disfavored class by exempting similarly situated persons from its reach. In *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), for example, the Court held that a generally applicable state income tax scheme that exempted retirement benefits provided by the State, but did not exempt retirement benefits provided by the federal government, violated principles of intergovernmental tax immunity. See *id.* at 806, 808, 814-818. The Court held that the state tax was not authorized by 4 U.S.C. 111, which gives the United States' consent to taxation of federal employees' compensation "if the taxation does not discriminate against the [federal] officer or employee because of the source of the pay or compensation." See *Davis*, 489 U.S. at 808 (quoting 4 U.S.C. 111). The Court explained, *inter alia*, that it was "undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees." *Id.* at 814. The Court in *ACF* cited *Davis* in support of the proposition that "tax exemptions, as an abstract matter, could be a variant of tax discrimination." 510 U.S. at 343.

In other cases, the Court has held that various state laws exempting favored classes (typically local businesses) from generally applicable taxes unconstitutionally discriminated against interstate commerce. In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (1984), for example, the Court held that a state excise tax on alcohol "discriminated" against interstate commerce in violation of the Commerce Clause because certain locally produced beverages were granted exemptions. See also, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 567, 583, 595 (1997) (holding that "an otherwise generally applicable state property tax violates the Commerce Clause * * * because its exemption for property owned by chari-

table institutions excludes organizations operated principally for the benefit of nonresidents"); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 639-646 (1984) (holding that State's wholesale gross receipts tax unconstitutionally discriminated against interstate commerce by exempting local manufacturers).

Accordingly, it is natural to think that tax exemptions given only to some individuals or businesses can be discriminatory. As Justice Scalia explained in his concurring opinion in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 210-211 (1994), an "'exemption' * * * against a 'neutral' tax, is no different in principle from" "a discriminatory tax" that "impos[es] a higher liability" on disfavored persons. Cf. *Levin* v. *Commerce Energy, Inc.*, 130 S. Ct. 2323, 2328, 2333 (2010) (explaining that the respondents' complaint, whether framed as an equal protection or a dormant Commerce Clause challenge, was that the State had "select[ed] [them] out for discriminatory treatment by subjecting [them] to" generally applicable taxes from which "others of the same class" were exempt) (second and third part of brackets in original) (citations omitted).

3. The 4-R Act's legislative history reinforces the natural reading of Section 11501(b)(4)'s term "discriminates" as encompassing disparate treatment of taxed and exempt entities. "The legislative history of the antidiscrimination provision * * * demonstrates Congress' awareness that interstate carriers 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969) (*1969 Senate Report*)). Those concerns are directly implicated when railroads, lacking political influence, are unable to procure the

favored tax-exempt treatment afforded to their competitors. *See West Lynn Creamery*, 512 U.S. at 200 (explaining that when a generally applicable tax is coupled with exemptions to similarly situated taxpayers, the "State's political processes can no longer be relied upon to prevent legislative abuse, because one of the [taxpayer] interests which would otherwise lobby against the tax has been mollified" by the exemption).

**B. This Court's Decision In *ACF* Does Not Bar Petitioner's Claim**

The Eleventh Circuit in *Norfolk Southern*, Pet. App. 26a-32a, and the Ninth Circuit in *ATSF*, 78 F.3d at 443, held that a state law under which rail carriers pay a non-property tax while certain other persons (typically competing transportation providers) are exempt cannot be challenged under Subsection (b)(4).[6] In so holding, these two courts failed to grapple with the plain language of Subsection (b)(4), the ordinary meaning of the term "discriminate," and the structure of the 4-R Act's anti-discrimination prohibition. Instead, the courts concluded that this Court's decision in *ACF*, *supra*, compelled dismissal of the railroads' discrimination claims. Pet. App. 26a, 32a (finding that *ACF* "controls our analysis" and that the decision is "determinative"); *ATSF*, 78 F.3d at 442-443 ("Although

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[6] By contrast, the Eighth Circuit has entertained rail carriers' challenges under Subsection (b)(4) to state sales and use taxes from which the carriers' direct competitors were exempt. *See Union Pac. R.R. v. Minnesota Dep't of Revenue*, 507 F.3d 681, 685-686 (2007); *Burlington N. Santa Fe Ry. v. Lohman*, 193 F.3d 984, 985-986 (1999), cert. denied, 529 U.S. 1068 (2000). Two state supreme courts within the Eighth Circuit found similar challenges cognizable under Subsection (b)(4). *See Burlington N. R.R. v. Commissioner of Revenue*, 606 N.W.2d 54, 57-59 (Minn. 2000); *Atchison, Topeka & Santa Fe Ry. v. Barr*, 338 N.W.2d 328, 344-346 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984).

*ACF* specifically addressed property tax exemptions, the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions."). Those courts misread *ACF*.

1. In *ACF*, this Court considered whether "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)." 510 U.S. at 340. To decide that question, the Court looked to "[t]he interplay between subsections (b)(1)-(3)" and the definition of "commercial and industrial property in (a)(4)," which it deemed "central to the interpretation of subsection (b)(4)." *Ibid.* Subsections (b)(1)-(3), which are specific to property taxes, require a comparison between the rate (or the assessment ratio) imposed on railroad property and the rate (or assessment ratio) imposed on other "commercial and industrial property." *Ibid.* Subsection (a)(4) identifies the reference point for the inquiries prescribed in Subsections (b)(1)-(3), by defining the term "commercial and industrial property" as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." *See ibid.* In light of that statutory structure, the Court explained, a plaintiff may establish a violation of Subsections (b)(1)-(3) only by showing that railroad property is taxed at a higher rate (or assessed at a higher percentage of true market value) than non-railroad commercial-or-industrial use property that is actually "subject to a property tax levy" (*i.e.*, not exempt). *Id.* at 340-342. The Court further explained that, because any property that is exempt from state taxation falls outside the 4-R Act's definition of "commercial and industrial property," such "[e]xempt property * * * is not part of the comparison class against which discrimination is mea-

sured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions." *Id.* at 342.

Having concluded that Subsections (b)(1)-(3) do not prevent States from taxing railroad property while exempting particular categories of non-railroad property, the *ACF* Court then addressed the question whether such differential taxation is nevertheless prohibited by Subsection (b)(4). The Court stated that "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." 510 U.S. at 343. The Court explained that "reading subsection (b)(4) to prohibit what" the other subsections, "in conjunction with subsection (a)(4), w[ere] designed to allow," would "subvert the statutory plan" and "contravene the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Id.* at 340 (quoting *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). The Court therefore concluded that although "tax exemptions, as an abstract matter, could be a variant of tax discrimination, [t]he structure of § 11501[1] * * * warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad property while exempting various classes of non-railroad property." *Id.* at 343 (internal citation omitted).

The Court further explained that "[o]ther considerations reinforce[d] [this] construction of the statute." *ACF*, 510 U.S. at 343. Because "[p]roperty tax exemptions are an important aspect of state and local tax policy," the Court found that the 4-R Act's "silence on the subject—in light of the explicit prohibition of tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place." *Id.* at 344. The

Court also stated that "the prevalence of property tax exemptions when Congress enacted the 4-R Act" suggested that "[p]rinciples of federalism" counseled against reading Subsection (b)(4) as a "prohibition of property tax exemptions," *id.* at 344-345, and that the legislative history of the 4-R Act did not support the plaintiff's position, *id.* at 345-346.

The Court determined that "though some may think it unwise to forbid discrimination in tax rates and assessment ratios while permitting exemptions of certain non-railroad property, the result is not 'so bizarre that Congress "could not have intended"' it." *ACF*, 510 U.S. at 347 (citation omitted). Based on "[t]he structure of § 1150[1] as a whole," the Court "conclude[d] that a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)." *Id.* at 340.

2. The Court in *ACF* did not decide the question presented in this case: whether a *non*-property tax that rail carriers pay, but from which certain other persons (including their trucking and shipping competitors) are exempt, is subject to challenge under Subsection (b)(4). The Court addressed the scope of Subsection (b)(4) with respect to property taxes, see 510 U.S. at 338-339; it did not comment on any other type of tax. Indeed, the *ACF* Court's only discussion of tax exemptions in general—as a category broader than property tax exemptions—came in its acknowledgment that "tax exemptions, as an abstract matter, could be a variant of tax discrimination," though the 4-R Act "does not speak with any degree of particularity to the question of tax exemptions." *Id.* at 343.

Contrary to the Eleventh Circuit's assertion (Pet. App. 29a), the *ACF* Court's analysis is not "equally applicable" to non-property taxes. The Court in *ACF* relied on the

facts that Subsections (b)(1)-(3) establish specific non-discrimination requirements for property taxes, and that those subsections require a comparison between taxes on rail transportation property and taxes on other "commercial and industrial property." 510 U.S. at 340. Because the term "commercial and industrial property" is limited to specified categories of "property * * * subject to a property tax levy," *id.* at 341 (quoting 49 U.S.C. 11501(a)(4))—a phrase the Court construed to mean "taxed property," *id.* at 342—a rail carrier cannot establish a violation of Subsections (b)(1)-(3) by showing that its property is taxed while other property is exempt, see *ibid.*

The Court in *ACF* further explained that Subsection (b)(4) should be construed with due regard for Congress's decision to "place[] exempt property beyond the reach of subsections (b)(1)-(3)." 510 U.S. at 343. The Court observed that "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." *Ibid.* Although Subsection (b)(4) "viewed in isolation" might plausibly be read to reach discrimination effected through tax exemptions for non railroad property, the Court found that reading of Subsection (b)(4) "untenable in light of § 11501[1] as a whole." *Ibid.*

That structural analysis does not logically apply to the sales and use taxes at issue here. Whereas Subsections (b)(1)-(3) specifically address (and allow) property tax exemptions, they are silent as to non-property tax exemptions. Neither Subsections (b)(1)-(3) nor any other 4-R Act provision establishes specific non-discrimination requirements for non-property taxes. No 4-R Act provision otherwise indicates that, with respect to allegedly discriminatory sales or use taxes, the only appropriate point of comparison

is other *taxed* transactions or activities. And nothing in the statute's text or history suggests that Congress intended to "allow[] the States to grant" exemptions from their sales and use taxes. Treating petitioner's current challenge as cognizable under Subsection (b)(4) therefore poses no threat of "nullify[ing]" (*ACF*, 510 U.S. at 343) any congressional policy choice reflected in the more specific 4-R Act provisions.

As applied to non property taxes, Subsection (b)(4)'s prohibition on state taxes "that discriminate[] against a rail carrier" therefore should be given its ordinary and natural meaning. As explained above (see pp. 14-15, *supra*), this Court has frequently struck down, as impermissibly discriminatory, state regimes that required some persons to pay taxes from which others were exempt. Indeed, absent some persuasive justification for the disparity, requiring a rail carrier to pay a tax from which its direct competitors are wholly exempt is an even starker form of discrimination than is requiring the rail carrier to pay a higher rate of tax than its taxed competitors are forced to pay. Because the language of Subsection (b)(4) readily encompasses state regimes that exempt competitors from taxes that railroads must pay, and because the structural inferences on which the *ACF* Court relied are rooted in 4-R Act provisions that apply only to property taxes, petitioner's challenge is cognizable.

3. Although the *ACF* Court described its structural analysis as "central to the interpretation of subsection (b)(4)," 510 U.S. at 340, the Eleventh Circuit did not discuss that analysis in *Norfolk Southern*. Instead, it focused on what the *ACF* Court described as "[o]ther considerations" that "reinforce[d]" the basic structural inference. *Id.* at 343; see Pet. App. 28a-31a; see also *ATSF*, 78 F.3d at 443.

None of those considerations warrants the weight the court of appeals gave them.

a. The court of appeals thought it significant that "[t]he language of [Sub]section (b)(4) prohibits a discriminatory 'tax' not a discriminatory tax exemption." Pet. App. 29a; see *ATSF*, 78 F.3d at 443. As an initial matter, and as the reformulated question presented makes clear (see p. (I), *supra*), this case involves a challenge to a discriminatory "tax." See Gov't Pet. Stage Br. 19 (suggesting that the question presented be reformulated because "petitioner's Subsection (b)(4) suit is properly viewed as challenging the allegedly discriminatory tax imposed on rail carriers"); Resp. Supp. Br. 6 (agreeing "that the United States more accurately frames the threshold question"). To be sure, petitioner's contention that the challenged taxes "discriminate[] against * * * rail carrier[s]," 49 U.S.C. 11501(b)(4), ultimately depends on the fact that its competitors are exempt. But the need for that comparison does not cast doubt on the cognizability of petitioner's discrimination claim. To the contrary, it is typical of discrimination cases that a plaintiff shows its own treatment to be unlawful by contrasting it with the more favorable treatment given to other, similarly situated persons.

This Court has frequently found unlawful tax discrimination in analogous circumstances (see pp. 14-15, *supra*), and it acknowledged in *ACF* that "tax exemptions, as an abstract matter, could be a variant of tax discrimination." 510 U.S. at 343. The *ACF* Court found the 4-R Act's failure to speak with a "degree of particularity to the question of tax exemptions" significant only when "contrast[ed]" with the "precise standards for judicial scrutiny" of property tax rate and assessment practices. *Ibid.* Without that contrast, the absence of an express mention of one potential means of discriminating (selective exemptions) is of little

significance—particularly in a catch-all provision like Subsection (b)(4), whose very purpose is to avoid the impractical task of anticipating and enumerating every possible discriminatory mechanism. See, *e.g.*, *Southern Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) ("Congress possessed a general concern with discrimination in all of its guises."), cert. denied, 465 U.S. 1100 (1984).

b. The court of appeals also observed that, "as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted." Pet. App. 30a. Again, although the *ACF* Court viewed that state-law backdrop as confirming evidence of Congress's intent to leave property tax exemptions undisturbed, see 510 U.S. at 344, it does not bear the independent weight the court of appeals gave it. The Court in *ACF* found preexisting state tax practices relevant only "in light of the explicit prohibition of tax rate and assessment ratio discrimination," *ibid.*—a counterpoint notably absent here. Standing alone, the ubiquity of a practice prior to the 4-R Act cannot render Section 11501 inapplicable because it was precisely the prevalence of discriminatory taxation schemes that prompted Congress to enact the 4-R Act's prohibition.

c. The court of appeals' third concern—principles of federalism—also carries little weight in this specific context. The 4-R Act is preemptive in its design and by its broad, clear, and express terms. Cf. *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 20-21 (2007) ("[E]ven if important questions of state policy are [implicated], * * * judicial scrutiny * * * is authorized by the 4-R Act's clear command."); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 464 (1987) ("[T]he language of [Section] 1150[1] plainly declares the congressional purpose," and "principles of comity" do not require a different outcome.). Thus, any presumption against pre-

emption is overcome by "the clear and manifest purpose of Congress" to preempt any discriminatory tax. *ACF*, 510 U.S. at 345 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.) ("[T]he argument that there is a presumption in favor of the states' broad taxing power must fail where the purpose of the legislation was to curb the states' power to inequitably tax railroads."), cert. denied, 454 U.S. 1086 (1981); cf. *CSX*, 552 U.S. at 21 ("That the statute should vest this authority in the Nation's courts is hardly surprising, given Congress's conclusion that the States were assessing railroad property unfairly.").[7]

### C. The Court Should Hold That Petitioner's Challenge Is Cognizable Under 49 U.S.C. 11501(b)(4) And Remand The Case For Further Proceedings To Determine Whether The Challenged Taxes Are Unlawful

Petitioner alleges that, by requiring rail carriers to pay sales and use taxes from which motor carriers and water carriers engaged in interstate and foreign commerce are

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[7] Notably, the appropriate remedy in a successful Section 11501(b)(4) challenge is not to undo the putatively favorable tax treatment accorded to non-rail carriers there, the exemption of certain non-rail carriers from Alabama's sales and use taxes). As this Court has explained in connection with constitutional challenges to state taxes, a federal court may not "decree a valid tax for the invalid one which the State ha[s] attempted to exact"; rather, the appropriate decree is that the invalid tax "may not be exacted." *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 752 (1961) (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960)). The remedial approach Congress prescribed in the 4-R Act is less intrusive to state sovereignty than this Court's approach in constitutional challenges. See *1969 Senate Report* 13 (rejecting the *Moses Lake* approach and indicating that, under the remedial provisions of 49 U.S.C. 11501(c), "[t]here is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion").

exempt, respondents have "discriminated against a rail carrier." J.A. 22. On its face, that is an actionable claim of discrimination under 49 U.S.C. 11501(b)(4). If Alabama had adopted generally applicable sales and use taxes that taxed fuel at a rate of four percent when used by rail carriers, and at a rate of two percent when used by motor carriers and water carriers engaged in interstate and foreign commerce, that scheme would be "subject to challenge" (*ACF*, 510 U.S. at 338) under Subsection (b)(4). For the reasons set forth above, petitioner's challenge does not cease to be cognizable simply because petitioner's competitors are exempt altogether (*i.e.*, taxed at a rate of zero percent) from the sales and use taxes at issue in this case.

A determination that petitioner's 4-R Act claims are cognizable would not necessarily mean that petitioner can ultimately prevail on the merits. As the United States explained in some detail in its amicus brief in *ACF*, Subsection (b)(4) prohibits "discrimination," not "differentiation." See generally Gov't Br. at 16-24, *ACF*, *supra* (No. 92-74). A state tax that treats a rail carrier differently than a similarly situated person "discriminates against a rail carrier" (49 U.S.C. 11501(b)(4)) only if the State cannot justify the differences in treatment.

The precise nature and contours of the inquiry into whether a particular state tax "discriminates against a rail carrier" in violation of Subsection (b)(4), however, are outside the scope of the question on which this Court granted a writ of certiorari. On remand, the lower courts can consider a number of subsidiary legal questions and can engage in any necessary factual inquiries. For example, the courts may be required to decide whether other aspects of respondents' overall tax scheme justify disparate application of the sales and use taxes on motor fuel; to assess whether respondents can otherwise justify such treatment;

and to consider what (if any) relevance the use to which state taxes (once collected) are put, or the taxes imposed by Alabama's political subdivisions, have on the analysis.[8]

This list is not exhaustive, and the government expresses no view on whether petitioner will ultimately be able to prove a 4-R Act violation. The ultimate question of discrimination is inherently factbound and may sometimes be complex, but this is a task that "district courts are used" to undertaking. *CSX Transp.*, 552 U.S. at 19 (noting that, under the 4-R Act, courts were required to ascertain a property's "true market value," however "complex" the judicial inquiry); cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 293 (1982) (holding that discrimination under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), "is a factual matter").

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[8] In *Norfolk Southern*, the plaintiff railroad argued that Alabama's taxing regime discriminates against rail carriers in violation of Section 11501(b)(4) "because Alabama uses the proceeds of the taxes levied on motor carriers to maintain roads and railroads do not receive similar subsidies." Pet. App. 35a. The Eleventh Circuit held that a claim of discrimination under Section 11501(b)(4) may not be premised on the manner in which tax proceeds are used. See *id.* at 35a-37a. The court explained that, *inter alia*, such an inquiry would require the court to "look past the particular tax at issue to analyze the overall state tax structure," which the court "decline[d]" to do "in line with the majority of other jurisdictions." See *id.* at 36a-37a & n.18 (citing cases). As the United States previously explained in *ACF* and in this case, a State may be able "to justify a specific tax exemption by showing that the exempt" class is subject to alternative and comparable "state or local taxes that are not levied against railroads." See Gov't Br. at 21-22, *ACF*, *supra* (No. 92-74); Gov't Pet. Stage Br. 17. This Court need not (and should not) decide these subsidiary questions. But they should be open on remand for full development by the parties and full consideration by the courts below.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2010

# AMICUS CURIAE BRIEF

No. 09-520

# In the Supreme Court of the United States

CSX TRANSPORTATION INC.,
*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE, et al.,
*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF OF ALABAMA EDUCATION ASSOCIATION, SCHOOL SUPERINTENDENTS OF ALABAMA, COUNCIL FOR LEADERS IN ALABAMA SCHOOLS, ALABAMA ASSOCIATION OF SCHOOL BOARDS, ALABAMA STATE UNIVERSITY, AUBURN UNIVERSITY, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JACKSONVILLE STATE UNIVERSITY, TROY UNIVERSITY, UNIVERSITY OF MONTEVALLO, UNIVERSITY OF NORTH ALABAMA, UNIVERSITY OF SOUTH ALABAMA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## ISSUES PRESENTED

Whether the State may grant exemptions from a generally applicable tax as long as the State taxes railroads proportionately to other taxpayers without subjecting the State and its tax structure to a challenge under 49 U.S.C. § 11501(b)(4).

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## INTEREST OF AMICI

This case involves the proper administration of Alabama's general sales tax on fuel sold to the rail industry. Pursuant to Alabama Code Section 40-23-35(f), virtually all of the sales tax collected in Alabama is earmarked for education and segregated along with certain other taxes into the Education Trust Fund ("ETF"), which is budgeted every year separately from the general funds of the state. Ala. Code § 40-23-35(f); 2010 Ala. Acts 610. These Amici represent various entities that rely directly on funds from the ETF. Should this Court find for the Petitioner, education funding upon which the Amici rely would be reduced, endangering their mission for education.[1]

## SUMMARY OF ARGUMENT

When § 11501 passed, the rail industry made the States a promise. "Our industry's just tax contributions have been an important cornerstone of State and local tax programs, and we expect to continue to pay our way and contribute our fair share in assisting the States to meet their responsibilities to their residents."[2] The Amici undertake this filing and

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[1] Pursuant to S. Ct. R. 37.6, the *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] *State Taxation Against Interstate Carrier Property, 1969: Hearings on S. 2289 Before the Subcomm. on Surface Transp. of*

seek to make good the promise made by the rail industry. In furtherance of the promise, the Amici ask that this Court consider what is at stake in this case for Alabama schools, children, and public colleges and universities. Should this Court find in favor of the rail industry, Alabama will lose funding for more than 250 teachers, resulting in not only the unemployment of those teachers, but also a dramatic increase in class size, a problem Alabama has worked so hard to reduce. 2010 Ala. Acts 610. This case could end funding for almost 1,400 of 25,000 support employees, including bus drivers and maintenance employees integral to the safety of our children and our schools. Id. This case could eliminate funding for two thirds of Alabama's school nurses, or four years of funding for Alabama's Reading Initiative ("ARI") and Alabama Math/Science/Technology Initiative ("AMSTI"). Id. The ARI and AMSTI programs have earned Alabama national praise, a circumstance that is all too rare for poorly funded public education in Alabama.[3] Alabama's public colleges and universities will suffer mightily along with K-12, and could cease to be the powerful economic development engines that Alabama has counted on for many years. It is in this context that the education community asks this Court to uphold the opinion of the lower court and to uphold the Department's interpretation of its sales tax statutes.

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*the S. Comm. on Commerce*, 91st Cong. 51 (1969 statement of AAR President Thomas M. Goodfellow).

[3] In 2002, Alabama's ARI received the Frank Newman Award for State Innovation from the Education commission of the States. www.ecs.org. In 2010, AMSTI was recognized as an "exemplary program of best practices in laboratory education" by the Center for Excellence in Education. www.cee.org; www.amsti.org.

## ARGUMENT

Railroads, particularly large ones with millions or billions in revenue, are expected to attempt to reduce their taxes when they can . . . legally. Accounting firms and tax lawyers are paid handsomely to be creative and innovative in advising their clients about ways to avoid taxes and retain revenues . . . under the law. But sometimes those strategies serve to entirely vitiate properly enacted tax statutes. Sometimes a state and its education community must respond to stem the tide of revenue losses if it is to be fiscally responsible to its citizens.

## THE INSTANT CASE IS HIGH STAKES FOR EDUCATION FUNDING IN ALABAMA

The Petitioner's Assistant Vice President for Tax Compliance testified that the Petitioner paid sales taxes on fuel of $3.3 million in 2005, $4 million in 2006, and $3 million in 2007. See Aff. Of Sean M. Craig in Support of Pl. CSX Transp. Inc.'s Mot. For Prelim. Inj. at 2, *CSX Transp. v. Alabama Dep't of Revenue*, No. 2.08-cv-655-UWC (N.D. Ala. May 29, 2008).[4] Respecting the annual sales tax obligations for

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[4] In addition to the claims for refunds against the Respondent, the Petitioner has also filed numerous claims for refunds of local sales tax, much of which also is dedicated to local schools. *CSX Transportation, Inc. v. City of Mobile, et al.*, No. CV-2010-901129.00 (Mobile County Ala. Cir. Ct. filed May 20, 2010) ($83,963.42); *CSX Transportation, Inc. v. Shelby County, Ala., et al.*, No. CV-2010-900461.00 (Shelby County Ala. Cir. Ct. filed May 19, 2010) ($531,695.68); *CSX Transportation, Inc. v. Jefferson County, Ala., et al.*, No. CV-2010-01490, (Jefferson County Ala. Cir. Ct. filed May 20, 2010) ($1,029,515.22); *CSX Transportation,*

the Petitioner, it is clear that annual sales tax claims for the remainder of the rail industry could easily push the total of the annual sales taxes at risk in excess of $20 million. Apart from the annual loss to Alabama's schools, the vast majority of the rail industry has filed for refunds of sales taxes paid in years past. Leaving alone the issue that these sales taxes have been collected, budgeted and spent for Alabama public schools years ago, the amount of refund claims that could be resurrected by this case is potentially devastating to Alabama's public schools.

Consider just one rail company, Burlington Northern, which has filed a refund petition for $3.5 million for three tax years. Joint Refund Pet., *W.C. Rice Oil Co. & Burlington N. & Santa Fe Ry. Co.*, (Ala. Dep't of Revenue filed March 19, 2008). For the balance of the large multi-state rail companies subject to Alabama's sales tax on fuel, it could mean more than $60 million in aggregate refunds. To the extent the rail industry continues to pay Alabama's sales tax on fuel, a scenario that is less likely every day considering the Petitioner ceased to pay the tax after 2007, refunds will continue to accumulate during this litigation for each subsequent tax year. See Aff. Of

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*Inc. v. City of Birmingham, et al.*, No. CV-2010-901772.00 (Jefferson County Ala. Cir. Ct. filed May 20, 2010)($3,124,475.20); *CSX Transportation, Inc. v. Montgomery County, et al.*, No. CV-2010-900648.00 (Montgomery County Ala. Cir. Ct. filed May 19, 2010) ($445,876.35); *CSX Transportation Inc. v. City of Montgomery, et al.*, No. CV-2010-900652.00 (Montgomery County Ala. Cir. Ct. filed May 19, 2010) ($624,100.21); *CSX Transportation, Inc. v. Ala. Dep't of Revenue*, No. CV-2010-900645.00 (Montgomery County Ala. Cir. Ct. filed May 19, 2010) ($5,260,607.58).

Sean M. Craig in Support of Pl. CSX Transp. Inc.'s Mot. For Prelim. Inj. at 2, *CSX Transp. v. Alabama Dep't of Revenue*, No. 2:08-cv-655-UWC (N.D. Ala. May 29, 2008). In other words, this appeal is the figurative dam that is preventing a significant and direct loss of education revenue that could all but end adequate public education in many Alabama counties.

## ALABAMA IS CONSTITUTIONALLY REQUIRED TO BALANCE ITS BUDGET WITH ANNUAL REDUCTIONS IN EDUCATION FUNDING

Unlike some other states, Alabama is constitutionally required to balance its budget each year and is prohibited from operating with a deficit. Ala. Const. Amend. XXVI. In other words, Alabama may not borrow to meet the obligation to provide public services. By statute Alabama has a procedure to automatically cut spending to comply with the constitutional obligation to balance the budget. Ala. Code § 41-4-90. That procedure is referred to as proration, and imposes cuts on funding across the board as a percentage of the shortfall. Id. For instance, if a school system, public college or university has an annual budgeted appropriation of ten million dollars and actual revenues are anticipated to be ten percent short of budgeted revenues, the appropriation for the school system, public college or university will be reduced by one million dollars during the budget year. Proration makes immediate and drastic cuts in times of recession, and Alabama has experienced the deepest and most drastic seen in decades during this most recent recession. With a high water mark for the ETF of $6.7 billion in 2008, the ETF state budgeted revenues in 2011 are just $5.1 billion. 2007 Ala. Acts

361, 2010 Acts 610. In the three most recent budget years, proration has reduced the ETF's total appropriation by nearly one quarter. This immediate and constant loss of funding pushes historically underfunded public schools ever closer to an inability to provide even a basic education to its students. This case may well present the straw that broke the camel's back.

## ALABAMA HAS EXPERIENCED DRASTIC CUTS IN EDUCATION FUNDING DURING THE RECESSION

The education community recognizes that Alabama is not alone in its budget struggles. Across the country up to 300,000 education employees will lose their jobs due to budget shortfalls, and thousands more will receive pay cuts through furloughs and shortened school years.[5] But make no mistake; the current recession has hit Alabama's schools extremely hard, much more so than other states that rely heavily on local property tax for funding. The majority of funding for Alabama's education programs comes from sales and income taxes, and these taxes are hypersensitive to recession and the economic cycles that inevitably occur. To date, Alabama has exhausted over $400,000,000 of savings that accrued during the early part of the most recent decade. Alabama temporarily borrowed, through constitutional amendment, over $436,000,000 from the oil and gas royalty trust fund that has yet to be repaid. Finally, both K-12 and

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[5] "Investing in Education: Secretary Arne Duncan's Remarks to the National School Boards Association," U.S. Dep't of Edu., www.ed.gov, February 1, 2010.

higher education received $1,000,000,000 over the last two years in onetime federal funding. Even after the infusion of these temporary outside resources to augment the ETF, Alabama schools still experienced over 20% proration.

There is little doubt Alabama is seeing the worst school-funding crisis in decades affect every school system in the state. As a clear sign of its severity, one in five Alabama school systems borrowed money to meet payroll and other expenses during the 2010 budget year. For the upcoming year, many Alabama schools systems will be relying on lines of credit to keep school doors open. The Alabama State Department of Education (ALSDE) identified five county systems, Choctaw, Coosa, Marengo, Perry, and Tuscaloosa that have continually borrowed money to make monthly payroll.[6] An additional 25 school systems reported anticipated borrowing during 2010.[7] In July, the ALSDE voted to financially intervene in Coosa and Sumter county schools because no lenders found those systems creditworthy enough to obtain needed loans. ALSDE officials note that the financial problems of these systems were not caused by mismanagement, but rather a lack of tax revenue and recent cuts implemented in the budgeting and proration process.[8]

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[6] Leech, Marie, "Alabama Board of Education Votes to Take Over School Systems," *The Birmingham News*, July 13, 2010.

[7] Id.

[8] Id.

In one county in particular, the school system does not have funding to hire a twelfth grade English teacher. Students in that county are taught senior English remotely, gathered around a computer monitor. Superintendents of systems regularly sell candy, firewood, and magazines and even install "slushie" machines in the schools to generate a little extra revenue for paper products, chalk or other basics. Textbook purchases have been eliminated in multiple budget years, technology is aging and is not being replaced or updated, classroom supply funds are non-existent, buses are not being replaced or even maintained in some instances. 2010 Acts 610. In preparation for an increase in program costs of $255 million, the Public Education Employee Heath Insurance Program (PEEHIP) Board approved the only increase in premiums since 1983. For the first time in nearly three decades PEEHIP was not fully funded by the legislature because there simply was not enough revenue to fund a quarter-billion dollars in health care increases. Id. And most importantly, Alabama is losing ground on the greatest predictor of outcomes in education--class size, as thousands of teachers and support professional positions have been eliminated.

## ALABAMA SCHOOLS ARE CHRONICALLY UNDERFUNDED AND YET PRODUCE HOPEFUL RESULTS

Alabama has a history of consistently underfunding schools in a state with a student population that is struggling with all manner of societal ills. One quarter of all children in Alabama live in poverty; thirty percent have no working parent in the home; thirty percent come from single parent households. Alabama ranks 47th overall in indicators that predict

the well being of children. Alabama is fortieth nationally in teen pregnancy and more than 35% of students in Alabama's public schools drop out before they graduate.[9]

Despite these great challenges, Alabama is succeeding in small ways and precariously. When compared nationally, Alabama funds K-12 at a D level and produces B- level results.[10] Alabama has the highest graduation requirements in the United States. Public high school students are required to pass a minimum of 24 credits.[11] This includes four years of mandatory English, mathematics, social studies, and science—known as four-by-four curriculum. Students are tested on fundamental concepts of core courses using the Alabama High School Graduation Exam. It is designed to measure students' ability in core course work, including logic, and other problem solving skills. Since the four-by-four curriculum was introduced to Alabama high school classrooms in 1996, average student achievement has increased every year.[12]

It cannot be overstated that these tender shoots of progress must be guarded with great care. Alabama's tax system is one of the most regressive in the nation, and produces unstable and inefficient results for school

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[9] http://datacenter/kidscount.org

[10] National Education Association Ranking of States and Stanford Achievement Test data.

[11] Alabama State Department of Education, "Education Facts" www.alsde.org.

[12] Id.

funding. Alabama has the lowest taxes in the nation, but Alabama also taxes its poor at regrettable levels.[13] Only Alabama and Mississippi tax food for home consumption.[14] Alabama's lowest-income residents pay more than twice as much of their income in state and local taxes as the highest-income residents do.[15] Alabama's income tax on a family of four at the federal poverty line is the nations highest.[16] This system is flawed in its design and consistently produces inadequate levels of revenue to fund schools. The sales tax, while regressive by nature, is a major component of Alabama's existing education funding. Alabama relies too heavily on this unstable and unpredictable tax in funding its education system. To erode the sales tax by creating exemptions or preventing the collection of the sales tax on certain transactions only increases the instability of the sales tax, and drives Alabama's education funding further downward.

Each year, the education community works together to prevent the erosion of the income and sales taxes that are dedicated to education funding. In 2010, the Alabama Education Association objected to hundreds of bills introduced in the legislature that

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[13] White, David. "Alabama Boasts Lowest Taxes in Nation," *The Birmingham News*, November 1, 2009.

[14] www.cbpp.org "Which States Tax the Sale of Food for Home Consumption in 2009?,"November 4, 2009.

[15] "Who Pays? A Distributional Analysis of the Tax Systems in all 50 States.," *Institute on Taxation and Economic Policy*, www.itepnet.org/state_reports/whopays.php.

[16] Id

would have reduced funding for education. Many of those bills dealt with exemptions from the state sales tax. No exemption is too insignificant to draw objection considering the razor thin margins under which the education community operates. In 2009, objections were raised against a bill that exempted baseball equipment purchased by a club for children with physical disabilities. H.B. 116, *2008 Leg., Reg. Sess.* (Al. 2008). The exemption could have reduced education funding by $1000 per year, but consistent with the mission to protect funding for education, the education community opposed the bill and it was defeated. *Public Hearing on H.B. 116, 2008 Leg., Reg. Sess. Committee on Education Appropriations* (Al. 2008). By filing this brief with this Court, the education community in Alabama intends to communicate its commitment to adequate funding of education in Alabama, and a vision that one day a lack of resources will not deter our progress. The education community fights daily and diligently to procure additional funding for education and to make the most of every dollar appropriated to the schools. It is with that same diligence and urgency that the community seeks redress from this Court.

## CONCLUSION

The education community asks this Honorable Court to uphold the Department's interpretation of the sales tax on fuel, and specifically, it asks this court to uphold the lower court's opinion.

Respectfully submitted,

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October 4, 2010

# AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
SEP 30 2010
OFFICE OF THE CLERK

No. 09-520

# In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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# BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

## INTEREST OF THE *AMICUS CURIAE*

The American Trucking Associations, Inc. ("ATA") is the national trade association of America's trucking industry.[1] ATA urges affirmance of the decision below. The Court granted certiorari on the question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. §11501(b)(4) as 'another tax that discriminates against a rail carrier.'" ATA answers "No."

ATA is a District of Columbia non-profit corporation with its headquarters and principal place of business in Arlington, Virginia. ATA has approximately 2,500 motor carrier company members and, in cooperation with State trucking associations and affiliated national trucking conferences, represents the interests of tens of thousands of motor carriers. ATA's membership includes every type of motor car-

[1] In compliance with Supreme Court Rules 37(3)(a) and (6), ATA states: (a) Petitioner (on June 22, 2010) and Respondents (on June 30, 2010) filed with the Clerk of the Court consents to the filing of amicus briefs in this case in support of either or neither party and the case is before the Court for oral argument; (b) no counsel for a party authored this brief in whole or in part; (c) no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and (d) no person other than the ATA, its members, or its counsel, made any such monetary contribution.

rier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA members operate in interstate commerce to, from, within, and through the State of Alabama. ATA members purchase, store and consume diesel fuel in Alabama.

The ATA has two interests in this case: (1) the practical economic interests arising from the complex relationships between the rail industry and the trucking industry in the American economy, which are affected by Alabama taxes and exemptions, and (2) the relationship between the Federal statute that prohibits States from imposing taxes that discriminate against railroads (49 U.S.C. §11501(b)(1), (2), (3) and (4)) and the Federal statute that prohibits States from imposing taxes that discriminate against motor carriers (49 U.S.C. §14502(b)(1), (2), and (3)), which has direct parallels to subsections (b)(1), (b)(2), and (b)(3) of the railroad statute (but not to subsection (b)(4)), both of which were enacted for the same purpose.

In evaluating arguments in this case, the Court should bear in mind the complexity of the motor carrier industry and the fact that motor carrier operations are generally as interstate in nature as those of the railroads. The parties stipulated that "[t]he principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property in interstate commerce ('motor carriers') and carriers of property in interstate commerce by ships, barges and other vessels ('water carriers')." Joint Appendix ("J.A."), 44.

Interstate motor carriers, like interstate rail carriers, are the protected class under federal law, and

it is discrimination against them in favor of local business interests generally that the provisions of sections 11501 and 14502 of title 49 are designed to prohibit. The interstate nature of motor carrier operations is reflected by the fact that some motor carriers compete with rail carriers in interstate commerce in Alabama, because shippers have the ability in some situations to choose between a rail carrier and a motor carrier in shipping property through Alabama. Other motor carriers in interstate commerce in Alabama are customers of rail carriers for trailer-on-flatcar movements. Some motor carriers are co-operators with rail carriers, because they transport property from the railhead to the ultimate destination, such as a warehouse or retail facility. Motor carriers can even be subsidiaries of railroads; for example, Petitioner CSXT's parent CSX Corporation owns motor carrier CSX Intermodal, Inc.[2]

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[2] CSX Corporation describes its trucking subsidiary, CSX Intermodal, Inc. as "a stand-alone, integrated intermodal transportation provider linking customers to railroads via trucks and terminals," claims that the trucking subsidiary "combines the superior economics of rail transportation with the short-haul flexibility of trucks, offers a competitive cost advantage over long-haul trucking," notes that the trucking subsidiary "serves all major markets east of the Mississippi and transports mainly manufactured consumer goods in containers," and reports that "[f]or 2009, Intermodal accounted for approximately 13% of the Company's total revenue and 33% of volume." CSX Corporation Annual Report Pursuant to the Securities Exchange Act of 1934 (2009)(SEC Form 10-K), Item 1. The CSX trucking subsidiary provides service at terminals in Bessemer, Alabama and Mobile, Alabama. *Id.*, Item 2.

## SUMMARY OF ARGUMENT

Subsection (b)(4) of the railroad statute (49 U.S.C. 11501(b)(4)) states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them: . . . (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.[3]

The plain text of §11501(b)(4) permits challenges to a "tax" – not a "tax exemption." In *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994) ("*ACF Industries*"), a case involving a State property tax, the railroad interest involved attempted to persuade the Court to construe subsection (b)(4) as if it said "impose another tax or grant a tax exemption that discriminates against a rail carrier providing transportation," but the attempt failed. The Court examined the text and structure of the statute, the background of historic and widespread exemption-granting conduct by States, and the principle that the Court will interpret a statute to pre-empt traditional state powers only if that result is the clear and manifest purpose of Congress. The Court concluded that subsection (b)(4) did not meet the "clear and manifest" standard with regard to the prohibition of property tax exemptions. *Id.* at

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[3] The reference to the "Board" is to the "Surface Transportation Board." 49 U.S.C. §10102(1). The reference to "this part" is to Part A. (Rail) of subtitle IV (Interstate Transportation) of title 49, United States Code.

345. The Court should reach the same conclusion with respect to subsection (b)(4) in this case involving non-property (sales and use) exemptions, because the statute also fails to demonstrate the necessary clear and manifest purpose of Congress, or unambiguous congressional mandate, to preempt Alabama law with respect to non-property tax exemptions.

To the extent that rail carriers profess concern that construction of §11501(b)(4) in this case not to apply to a State's exemption-granting conduct would allow a wayward State to circumvent §11501(b)(4) by imposing a tax on everyone and then granting exemptions from the tax for everyone but the railroads, the Court has already identified in ACF Industries the correct path for handling such a concern. Under §11501(b)(4) the rail carriers should only have a claim in those circumstances in which the exemption-granting conduct becomes tax-imposing conduct, and the court should look to the entire class of property, persons or transactions which are reasonably within the State's tax base – not just competitors – to determine if the rail carriers are being singled out.

Following that path, the general rule should be that exemption-granting conduct does not give rise to a cause of action under §11501(b)(4), with one narrow exception. The exception would be if and only if the railroad interest shows at the threshold, by clear and convincing evidence, that the State has granted exemptions to everyone but the rail carriers, either alone or as part of some isolated and targeted group, such that the State's conduct is in substance tax-imposing conduct subject to examination under §11501(b)(4) rather than exemption-granting conduct

which is not subject to examination under §11501(b)(4).

## ARGUMENT

### I. SECTION 11501(b)(4) PROHIBITS CERTAIN STATE TAX-IMPOSING CONDUCT, BUT NOT STATE EXEMPTION-GRANTING CONDUCT

Subsection (b)(4) of the railroad statute (49 U.S.C. 11501(b)(4)) states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them: . . . (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

Because the conduct of Alabama challenged in this case – the granting of exemptions from taxes of general applicability that apply to rail carriers and others – does not violate §11501(b)(4), the Court should affirm the judgment below.

"We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Supremacy Clause provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every

> State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Congress validly exercised its power under the Commerce Clause "To regulate Commerce . . . among the several States" in enacting §11501(b)(4), as is plain from the text of §11501(b) declaring acts enumerated in that section to "unreasonably burden and discriminate against interstate commerce."[4] If the Alabama law does what §11501(b)(4) prohibits, then §11501(b)(4) preempts the Alabama law. The central

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[4] Views vary whether Congress, in enacting §11501(b)(4), also validly exercised power under section 5 of the Fourteenth Amendment to enforce by appropriate legislation that Amendment's provision that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Compare Judge Garth, dissenting in *Wheeling & Lake Erie Railway Co. v. Public Utilities Commission of Pennsylvania*, 141 F. 3d 88, 98-100 (3d Cir. 1998), *cert. denied*, 528 U.S. 928 (1999)("after *Seminole Tribe*, and in the absence of any other legitimate constitutional grant of power, the Congressional intent to abrogate the States' sovereign immunity under the 4-R Act cannot be upheld as enacted pursuant to a valid exercise of power") with the opposite views of four circuits. *CSXT v. New York State Office of Real Property Services*, 306 F. 3d 87 (2d Cir. 2002)(Congress validly overrode State's Eleventh Amendment immunity by enacting railroad statute pursuant to Section 5 of the Fourteenth Amendment and separately court had power, without contravening Eleventh Amendment, to enjoin future violations of statute under doctrine of *Ex Parte Young*, 209 U.S. 123 (1908)); *Burlington Northern & Santa Fe Railway Co. v. Burton*, 270 F. 3d 942 (10th Cir. 2001), *cert. denied* 536 U.S. 959 (2002); *Union Pacific Railroad Co. v. Utah*, 198 F. 3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie Railway Co. v. Public Utilities Commission of Pennsylvania*, 141 F. 3d 88, 98-100 (3d Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); and *Oregon Short Line Railroad v. Department of Revenue*, 139 F. 3d 1259 (9th Cir. 1998).

issue in this case, then, is whether §11501(b)(4) prohibits exemption-granting conduct.

Under a web of Alabama tax laws affecting diesel fuel, rail carriers, such as CSXT, generally pay 4% sales and use taxes on the diesel they use, but generally do not pay a 19-cent excise tax on that diesel; conversely, motor carriers generally pay the 19-cent excise tax on the diesel they use, but generally do not pay the 4% sales and use taxes.[5] See *Norfolk Southern Railway Company v. Alabama Department of Revenue*, 550 F. 3d 1306, 1307-1309 (11th Cir. 2008). CSXT sued the Alabama Department of Revenue and, in official capacity only, its head under §11501(b)(4) "seeking to restrain and enjoin defendants . . . from assessing, levying, or collecting from plaintiff Alabama sales and use taxes on plaintiff's purchase or consumption of diesel fuel and gasoline used for rail transportation purposes in Alabama." J.A., 17, Complaint, ¶ 1.

### A. Section 11501(b)(4) Says "Tax," and Not "Tax Exemption," and Therefore Reaches Tax-Imposing, and Not Exemption-Granting, State Conduct

The plain text of §11501(b)(4) answers the question posed by the Court: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. 11501(b)(4) as 'another tax that discriminates

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[5] The State of Alabama Department of Revenue has noted that "railroads have received preferential treatment by paying less tax per gallon of diesel fuel than their direct competitors." Brief in Opposition to Petition for Writ of Certiorari, 1.

against a rail carrier.'" On its face, §11501 prohibits State imposition of taxes. It does not prohibit State granting of exemptions from taxes. And the granting of an exemption is not the imposition of a tax.

No matter how many times Petitioner CSXT and the Solicitor General say that "another" means "any other" and the word "any" is a word of broad meaning, Brief for Petitioner at 15-17 and Brief for the United States as Amicus Curiae at 12-13, in §11501(b)(4) the word "another" modifies the word "tax" and an exemption is not a "tax." Similarly, no matter how many times the Solicitor General invokes constitutional cases dealing with "discrimination" among taxpayers that involve both taxes and exemptions, Brief for the United States as Amicus Curiae, 14-15, the word "discriminates" is a verb specifically tied to the subject "tax" in §11501(b)(4)("tax that discriminates"), and an exemption is not a "tax." CSXT has come into court with a claim under §11501(b)(4) – which prohibits certain taxes and does not prohibit any exemptions. CSXT has made no claim under any other Federal statute or under any clause of the Constitution.

This Court said in *ACF Industries* that "[w]e will interpret a statute to pre-empt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.'" 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) ("[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest pur-

pose of Congress.'") (citations omitted). The Court has made clear that "we are not to conclude that Congress legislated the ouster" of a State statute "in the absence of an unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47, *reh'g denied*, 374 U.S. 858 (1963). Section 11501(b)(4) shows no "clear and manifest" purpose, nor any "unambiguous congressional mandate," to prohibit exemption-granting conduct by the States.

The Court concluded in *ACF Industries* that the subsection (b)(4) involved in that case (which is the substantively identical predecessor to §11501(b)(4) at issue in this case) does not meet this "clear and manifest" standard with regard to the prohibition of property tax exemptions. *Id.* at 345. Section 11501(b)(4) also does not meet the standard of a "clear and manifest purpose" to pre-empt with regard to the prohibition of non-property tax exemptions, as the text of §11501(b)(4) does not distinguish between property taxes and non-property taxes. Accordingly, our view is that State exemption-granting conduct is not challengeable under §11501(b)(4). "Principles of federalism support, in fact compel, our view." *ACF Industries*, 510 U.S. at 345.

### B. Congress Legislated Against a Background of Widespread and Historical Practice of Granting Exemptions from Non-Property Taxes in States

In *ACF Industries*, the Court examined the text of the railroad statute and considered principles of statutory construction and other considerations – including compelling principles of federalism and the longstanding practice of States granting exemptions

in the face of which Congress was silent – and concluded that property tax exemptions do not give rise to a claim of discrimination under subsection (b)(4). That conclusion does not logically carry a negative implication that non-property tax exemptions do give rise to such a claim.

Indeed, the Court's conclusion in *ACF Industries* that Congress acted with knowledge and silent acceptance of the longstanding practice of States to grant property tax exemptions applies as well with respect to the longstanding practice of States to grant State non-property tax exemptions. 510 U.S. at 344 ("Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, §11503's silence on the subject – in light of the explicit prohibition of tax rate and assessment ratio discrimination – reflects a determination to permit the States to leave their exemptions in place."); see *Norfolk Southern Railway v. Alabama Department of Revenue*, 550 F. 3d 1306, 1315 (11th Cir. 2008) (". . . as with property tax exemptions, sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted, and thus benefit from the same presumption that Congress' silence reflects a determination to leave such exemptions in place."); *id.* at 1315 n.13 ("In 1976 and before, most states exempted various entities and goods from sales taxes."). The States have had, since before enactment of §11501(b)(4), a widespread and historical practice of granting exemptions from sales and use taxes, in the face of which the Court should not read §11501(b)(4) to "prohibit a type of tax exemption the text did not expressly mention." *CSX Transportation, Inc. v.*

*Georgia State Board of Equalization*, 552 U.S. 9, 21 (2007).[6]

Petitioner CSXT quotes approvingly the Solicitor General's view that "[a] rail carrier's showing that it pays a tax, while competitors do not, is a proper basis for challenging the tax under Subsection (b)(4)." Brief for Petitioner, 22. Petitioner appears to be of the view that the grant of a tax exemption should be treated as if it were the imposition of a tax, but at a rate of zero, and then the rate the railroad pays should be compared to zero. Such a misconstruction of §11501 would take away much of a State's traditional power to grant exemptions in establishing its taxation policies. At all events, the grant of an exemption is not the imposition of a zero-rate tax – the grant of an exemption is not a tax at all.

Because §11501(b)(4) prohibits only imposition of taxes, and not the granting of exemptions, a State's exemption of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel does not subject the taxes to challenge under 49 U.S.C. §11501(b)(4) as "another tax that discriminates against a rail carrier."

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[6] In fact, the Alabama exemption challenged here by CSXT was enacted in 1951, ten years before Congress began addressing the rail carriers' concern with discriminatory state taxation. There is no indication in the extensive legislative history covering the fifteen years before initial enactment of what became §11501 that amicus Association of American Railroads objected to the Alabama exemption or similar exemptions existing in other states.

### C. Exemption-Granting Conduct Should be Actionable Under Section 11501(b) Only if a State Singles Out Rail Interests for Taxation While Exempting In-State Commercial and Industrial Taxpayers from the Impact of the Challenged Tax

The Court in *ACF Industries* acknowledged that there may be a circumstance in which exemptions granted by the State are so widespread that the exemption-granting conduct becomes tax-imposing conduct and may be challengeable under §11501(b)(4). 510 U.S. at 346-47. Only by improperly limiting the discrimination claim to comparison with the class of rail competitors can CSXT make plausible its argument that exemption-granting conduct is actionable. Brief for the United States as Amicus Curiae at 22 ("To be sure, petitioner's contention that the challenged taxes 'discriminate[] against . . . rail carrier[s],' 49 U.S.C. 11501(b)(4), ultimately depends on the fact that its competitors are exempt.") ATA submits that proper consideration of whether Congress intended to prohibit state exemption-granting conduct under subsection (b)(4) should begin with consideration of what is the appropriate comparative class for purposes of assessing whether the rail carriers have, in fact, been singled out. If, as ATA believes, the comparative class is in-state commercial and industrial taxpayers "logically within the tax base," see *ACF Industries*, 510 U.S. at 347 (quoting J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 973 (5th ed. 1988)), the Congress could not have reasonably intended that the exemptions challenged here provide the basis for a claim of discrimination. As described below, there are fundamental problems with utilizing railroads'

competitors as the comparative class for determining whether discrimination under subsection (b)(4) has occurred.

When Congress has prohibited State discrimination in taxes, it has prohibited States from favoring in-State businesses over out-of-State businesses and has not picked winners and losers among out-of-State interests. The railroad statute (49 U.S.C. §11501) is but one statute in the broad structure of Federal laws that limit tax-imposing conduct by States. In enacting that broad structure of statutes, Congress has focused on prohibiting States from favoring in-State interests over out-of-State interests, and not on competition among out-of-State competitors.[7] In addition to the railroad statute, Congress enacted statutes protecting, from discriminatory State taxes, trucking (49 U.S.C. §14502), air carriers (*id.* §40116), and electricity (15 U.S.C. §391), each of which protects an interstate

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[7] Because petitioner's claim relies solely upon the exemption of the railroad's competitors, petitioner argues that looking to competitors as the comparative class is consistent with congressional intent. Brief for Petitioner, 20. As support, petitioner cites the Eighth Circuit's opinion in *Burlington Northern Santa Fe Railway* v. *Lohman*, 193 F. 3d 984 (8th Cir. 1999). ATA believes the Eighth Circuit misconstrued the purpose for enactment of what is now §11501. As petitioner and amicus Association of American Railroads note, proposals to prohibit discriminatory taxation of railroads were considered for fifteen years prior to enactment as part of the Railroad Revitalization and Regulatory Reform (4-R) Act. The 4-R Act, admittedly, had a broader purpose to restore financial stability and competitiveness, which was accomplished through six enumerated methods, Pub. L. No. 94-210, §101(a)(1)-(6), but limiting State taxation authority was not one of those methods. Rather, the purpose for enacting what is now §11501 is more accurately characterized by amicus AAR, as discussed below.

business from State efforts to favor in-State interests over out-of-State interests.

Amicus Association of American Railroads (the principal institution that lobbied for enactment of the initial statutory predecessor to §11501) essentially recognizes that it was not the purpose of §11501 to prohibit a State from affecting the relative competitiveness of interstate railroads and their interstate competitors (such as elements of the trucking industry) when AAR says "[t]axing interstate railroads to benefit local constituents is a difficult potion to resist" and that "[i]t was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501." Brief of Amicus Curiae AAR In Support of Petitioner, 8. Exempting railroad competitors, such as trucking, from a generally applicable State sales and use tax neither "benefit[s] local constituents" nor pursues a "parochial state interest." Indeed, Congress was worried about State taxes discriminating against trucking just as it was about State taxes discriminating against railroads. See 49 U.S.C. §14502. In looking at State tax discrimination broadly, railroads and trucking conceptually belong side-by-side in the class of statutorily-protected entities, to be compared to in-State businesses, rather than in two separate classes to be compared to each other.

In deciding whether the railroads have been singled out via a pervasive exemption scheme, a court should consider the taxation of all in-state commercial and industrial taxpayers within the State's tax base – not just interstate transportation competitors.

## II. THE COURT HAS IDENTIFIED THE PROCEDURE FOR HANDLING THE RARE CASE IN WHICH PLAINTIFF RAIL INTEREST CLAIMS STATE EXEMPTION-GRANTING CONDUCT IS REALLY TAX-IMPOSING CONDUCT: THE PLAINTIFF BEARS A HEAVY BURDEN AT THE THRESHOLD

To the extent rail carriers claim that a state tax scheme challenged under §11501(b)(4) has crossed the line from exemption-granting conduct to tax-imposing conduct, the Court has already identified in *ACF Industries* the correct path for effectively handling such a claim.

Following the path marked by *ACF Industries*, the general rule should be that, when a railroad interest alleges discrimination under §11501(b)(4), the railroad interest must show at the threshold that the State has granted exemptions to everyone but the rail carriers, either alone or as part of some isolated and targeted group, such that the State's conduct is in substance tax-imposing conduct which is subject to examination under §11501(b)(4) rather than exemption-granting conduct which is not subject to examination under §11501(b)(4). See *Burlington Northern and Santa Fe Railway Co. v. State Tax Commission of Missouri*, 188 F. 3d 1039, 1042 (8th Cir. 1999) (" . . . our inquiry here turns on whether the State singles out railroad property for taxation because it exempts all or nearly all other personal property from taxation under" the statute at issue); *Burlington Northern Railroad Company v. Wisconsin Department of Revenue*, 59 F. 3d 55, 58 (7th Cir. 1995) ("The railroads can only succeed by

showing that the actual tax levied is a general tax in name only and is in fact a tax on railroads.").

The railroad interest should have the burden of persuasion of establishing that a state, via exemptions, has singled it out for discriminatory tax treatment, both because that burden traditionally falls upon the plaintiff, *Gross v. FBL Financial Services*, 129 S. Ct. 2343, 2345-46 (2009) ("Where a statute is 'silent on the allocation of the burden of persuasion,' 'the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.'"), and because of the presumption of regularity that attaches to the State legislation challenged. *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

Further, a heightened "clear and convincing evidence" standard for the railroad interest's burden of persuasion is appropriate because, in attempting to invoke the exception for exemption-granting conduct that amounts to tax-imposing conduct, the railroad interest seeks to deprive the State of the protection afforded by the Tax Injunction Act (28 U.S.C. §1341) ("TIA") to the State's exemption-granting conduct. The rail carrier seeks to have exemption-granting conduct treated as tax-imposing conduct, because the latter, but not the former, falls within the override of the TIA in §11501(b). The TIA prohibition on Federal injunctions interfering with State taxation is a strong Federal policy, and Federal courts should construe exceptions to that policy narrowly. *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 827 (1997) ("Given

the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text."). Further, the comity doctrine counsels that Federal district courts resist engagement in cases attempting to invoke the narrow exception, for exemption-granting conduct that is in substance tax-imposing conduct, out of respect for state functions in our Federal system. See *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010). Finally, as the State defends against a railroad that challenges the State's exemption-granting conduct as if it were tax-imposing conduct, the State has the benefit of the presumption of regularity to which the acts of a State legislature are entitled, *Evans v. Buchanan*, 582 F. 2d 750, 778 (3d Cir. 1978) (in banc), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980) (presumption of regularity and constitutionality for State statutory solution).

The "clear and convincing evidence" standard for the railroad interest's burden of persuasion in invoking the narrow exception to dismissal of challenges to exemption-granting conduct properly serves two strong Federal interests: non-interference by Federal courts with State taxation (as reflected in the Tax Injunction Act and the comity doctrine) and respect for the legislatures of the States in the Federal system (as reflected in the presumption of regularity).

## CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted.

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SEPTEMBER 2010

# AMICUS CURIAE BRIEF

AUG 19 2010

No. 09-520

IN THE

# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a non-profit trade association of interstate rail carriers.[1] Its members include major freight rail systems, passenger and commuter rail networks, regional railroads and short lines.[2] AAR represents its members before courts, agencies and the Congress in matters of common concern.

AAR's members carry almost all of the Nation's rail freight and employ almost all U.S. railroad workers. Every year they move raw materials and products worth hundreds of billions of dollars, goods that generate economic activity both before they are shipped and after they reach their destination.

Interstate transportation of commodities by rail—from, to and across multiple states—is critical to the Nation's economy. Railroads not only were one of the first instrumentalities of interstate commerce but also continue to be one of the most important. They facilitate an enormous volume of productive activity

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[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. (Petitioner is a member of AAR, however, and pays general membership dues.) No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund this brief.

[2] For a list of AAR's members and affiliate members, *see* Our Members, Ass'n of Am. R.R., http://www.aar.org/aboutaar/ourmembers.aspx?p=1 (last visited Aug. 9, 2010). Affiliate members include additional commuter, regional and short line railroads. *See id.*

in the industrial, mining and consumer goods sectors, as well as others. Indeed, railroad carloadings are widely regarded as a leading economic indicator.[3] Future economic growth throughout the Nation depends on the railroads' ability to invest in expanded and improved facilities.[4]

Railroads are the most efficient mode for long-haul freight transportation, capable of moving larger unit volumes of freight than air or motor carriers and of reaching many more destinations than water carriers. They also are the most environmentally sound: they use less fuel per ton-mile moved and generate less hydrocarbon waste than motor carriers, and provide service without further congesting crowded public highways.[5]

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[3] In the context to today's economy, railroad carloadings have been termed "one of the timeliest gauges of economic activity." Kelly Evans, *Flashing Caution on Weak Rail Demand*, Wall St. J., Jan. 19, 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703626604575011051244374676.html.

[4] *See, e.g.*, Joseph Szabo, Administrator, Fed. R.R. Admin., before the Transportation Research Board 1 (Mar. 8, 2010), http://www.fra.dot.gov/downloads/Joseph-Szabo-TRB-Freight03082010FINAL.pdf [hereinafter "Szabo Remarks"] (noting that "it is apparent that additional freight capacity is needed for our economy to grow in the future.").

[5] As Federal Railroad Administrator Szabo recently explained:

> When comparing the fuel efficiency of rail to truck in competitive corridors and for similar service characteristics, rail was up to 5.5 times more fuel efficient than truck.
>
> And as the length of haul increases the advantage of rail's fuel efficiency is compounded.

New entrants into the rail industry have proliferated in the wake of dramatic reforms that culminated in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).[6] There are now more than 500 freight railroads operating in the United States; in addition to 40 Class I and regional carriers, there are more than 300 small line-haul carriers and nearly 200 switching and terminal companies.[7] Almost all of those smaller railroads handle shipments destined for or coming from other states, and consequently are engaged in interstate transportation subject to the jurisdiction of the Surface Transportation Board. *See, e.g., Atl. Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, 268 (1927).

The rail industry is subject to a variety of state and local taxes, which generate enormous revenues. The

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> All of the improvements to the system helps lower the nation's total logistics cost bill.
>
> This helps to lower the price that consumers pay for products and helps keep the nation competitive in the world economy.

*Id.* at 4.

[6] After moving in the aftermath of the Northeast railroad collapse to enact reforms in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306(1)(a), 90 Stat. 31, 54 (1976) [hereinafter the "4-R Act"], Congress eliminated many other restraints that had led to the rail industry's decline in the Staggers Act.

[7] *See* Ass'n of Am. R.R., *Railroad Facts* 68 (2009); *see also* U.S. Surface Transp. Bd., FY 2007-2008 Annual Report, app. D, *available at* http://www.stb.dot.gov/stb/docs/AnnualReports/annreportfinal0708.pdf.

seven Class I railroads alone paid state and local taxes of more than $1 billion in 2009.

Congress enacted Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501 (2006), to ensure that the taxes states impose on these vital instrumentalities of nationwide commerce are not *discriminatory*—as they often had been in the past.[8] It bans four specified "acts" of state and local taxation that Congress declared would "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b).[9] The first three deal specifically with property taxes. 49 U.S.C. § 11501(b)(1)-(3). The fourth, at issue in this case, prohibits "another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4).

AAR and its members were deeply involved in the process that led to Section 11501's enactment. It is critical for them—as well as the many smaller railroads interconnected with them and customers throughout the Nation reliant on rail service—that

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[8] Congress studied the history of discriminatory state taxation of railroads and its effects over a fifteen-year period leading up to passage of the 4-R Act. *See, e.g.*, S. Rep. No. 94-499 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14; H.R. Rep. No. 94-725 (1975); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630 (1969); Special Study Group on Transp. Policies in the U.S., Sen. Comm. on Commerce, Nat'l Transp. Policy, S. Rep. No. 87-445 (1961).

[9] There are differences in statutory language between Section 306 as enacted and its recodification at 49 U.S.C. § 11503, later redesignated as 49 U.S.C. § 11501. However, recodification was not intended to effect any substantive change. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987) ("*Oklahoma Tax Comm'n*").

the statute be interpreted so as to achieve the goal Congress intended: to eliminate state tax discrimination against railroads, however that discrimination may be accomplished.

Since Section 11501 was enacted, states and localities have been inventive in seeking ways to evade it. Those efforts continue. The decision below offers a "free pass" for discrimination accomplished by exempting other taxpayers from a tax railroads must pay, and provides a road map other states can be expected to follow. AAR and its members have a crucial interest in urging that decision be reversed.

## SUMMARY OF ARGUMENT

Congress enacted Section 11501 to eliminate harmful state tax discrimination against interstate railroads for all time. To that end, it did not stop at prohibiting property tax discrimination, which had been the most common vice historically and which is addressed in subsections (b)(1)-(b)(3). Congress went on to add subsection (b)(4), a broadly-worded catch-all banning "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4).

The decision below opens a gaping hole in the protections Congress created. As Petitioner shows, making discrimination-by-exemption free from challenge is contrary to the plain text of the statute when the tax at issue is not a property tax. *See* CSX Br. 13-22. Nothing in *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994) on which the Eleventh Circuit based its decision requires otherwise. *See* CSX Br. 22-28.

The harm this invites is enormous. States and localities have always had motive to shift tax burdens away from their own residents and onto instrumentalities of interstate commerce. Congress enacted Section 11501 to keep that motive in check, so that national interests would no longer be thwarted by parochial ones. The Eleventh Circuit's rule would allow states and localities to evade the strict protections Congress sought to impose, adding opportunity to the motive already there.

There is no justification for giving states that opportunity. Congress expressly declared that state tax discrimination against railroads unreasonably burdens and discriminates against interstate commerce. While the statute's prohibition is broad, it is at the same time tightly focused, so that the only intrusion on state tax prerogatives is that necessary to protect the national interest. The concerns of federalism were considered and resolved by Congress; they afford no basis for tampering with what the statutory text requires.

The history of tax discrimination against railroads makes clear that states and localities will take advantage of the opportunity the Eleventh Circuit rule creates. The current economy makes that an even likelier prospect. Indeed, recent experience shows that state and local governments continually seek ways to evade Section 11501 even without the handy device the decision below offers.

The harm the Eleventh Circuit's rule invites is particularly acute in the difficult circumstances now facing the Nation. Future growth depends on a healthy, improved and expanded infrastructure for interstate and foreign commerce, in which railroads

are a critical part. That is precisely the national interest Section 11501 was designed to protect.

## ARGUMENT

### I. THE ELEVENTH CIRCUIT MISREAD SECTION 11501(b)(4) AND WRONGLY APPLIED *ACF INDUSTRIES*

The court below summarily affirmed dismissal of Petitioner CSX Transportation Inc.'s challenge to the Alabama sales and use tax on railroad diesel fuel, citing *Norfolk Southern Railway v. Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008) (Pet. App. 1a). As Petitioner demonstrates, *Norfolk Southern* was wrongly decided. CSX Br. 13-28. The Eleventh Circuit's interpretation of Section 11501(b)(4) is contrary to the statute's plain language and rests on the false premise that this Court's decision in *ACF Industries* applies here.

There is no need to reiterate Petitioner's arguments. It is important, however, to understand the context in which Section 11501 was enacted and the fundamental problem the statute addressed.

The problem Congress addressed was a structural one, stemming from the very type of conflict between federal and state interests that the legislative power conferred by the Commerce Clause was designed to resolve. As the Founders recognized, in the "competitions of commerce," states will "endeavor to secure exclusive benefits to their own citizens." The Federalist No. 7, at 28 (Alexander Hamilton) (Max Beloff ed., 1948). To a state pursuing its parochial interest, channels of interstate commerce offer particularly attractive targets for taxation. Not only

do instrumentalities operating over those channels create value, they do so in large part for customers who are located in other states; by its nature, a discriminatory tax on interstate railroads will be borne largely outside the taxing state. And this structural impulse is unchecked by any effective political counterweight, because the tax does not have to be paid by in-state voters.[10] Taxing interstate railroads to benefit local constituents is a difficult potion to resist.

So it is not surprising states drank it heartily, to the point that discriminatory state taxation was a major cause of the rail industry's acute deterioration in the middle of the 20th century. *See* S. Rep. No. 87-445. Studying the problem over a decade and a half period in which Northeastern and Midwestern rail systems struggled, then collapsed, Congress recognized that interstate railroads "are easy prey" for state taxes. S. Rep. No. 91-630, at 3.[11]

It was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501. *See* S. Rep. No. 94-499, at 2-3 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14, 15-16; H.R. Rep. No. 94-725, at 53 (1975). Putting an end to discriminatory taxation of railroads was its express goal. And while three

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[10] As this Court has noted, railroads are "'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc. v. Bd. of Equalization of S.D.*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3).

[11] While Congress spoke there in the context of property taxes levied by "state and local tax assessors," its point is equally true for state legislatures and other types of taxation.

provisions dealt specifically with property taxes, a source of much of the harm theretofore, Congress took pains to ensure that discrimination did not return in some different guise by adding the broadly worded catch-all in subsection (b)(4).

The passage of time has not diminished the evils Congress addressed, or the importance of the remedies it enacted. The impulse to impose discriminatory state taxes on railroads remains strong. It is particularly acute today, when many state and local governments face sharply falling revenues caused by the recent decline of world, national and local economies.

At the same time, the need to prevent states and localities from shifting undue tax burdens onto railroads could not be more critical. Interstate railroads must provide the backbone for national economic recovery. To do so, they must invest billions of dollars in new infrastructure to carry freight across the Nation.[12] Congress has affirmed

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[12] *See, e.g.*, Szabo Remarks at 3 ("The [railroad] industry ramped up investment from $6.4 billion in 2005 to $8.5 billion in 2006 and top out at $10.2 billion in 2008.") That is only a fraction of the total capital investment necessary for the improved rail infrastructure on which future national economic growth depends. *See, e.g.*, Ass'n of Am. R.R., *Nat'l Rail Freight Infrastructure Capacity and Investment Study* at ES-1 to -2, 7-1 to -5 (2007), *available at* http://www.aar.org/sitecore/content/Home/AAR/IndustryInformation/National Capacity Study/~/media/Files/National CAP Study_docs/natl_freight_capacity_study.ashx (estimating required investment of $148 billion in 2007 dollars for rail infrastructure to keep pace with economic growth and meet U.S. Department of Transportation forecast of rail freight demand through 2035). *See also* Am. Ass'n of State Highway and Transp. Officials, *Unlocking Freight* (2010),

the need for rail investment to assist the economy by creating grant programs for rail projects.[14] While such programs pay only a small fraction of capital improvement costs—most of which continue to be borne by the railroads themselves—they underscore the need to prevent any individual state from damaging the instrumentalities of interstate commerce on which true national economic recovery depends.

The Eleventh Circuit's decision would open an enormous loophole in the comprehensive, permanent ban on state tax discrimination that Congress had the foresight to adopt in Section 11501. It would permit states to extract disproportionate tax revenue from interstate railroads by exempting favored, local, non-rail enterprises from "another tax"—which is to say *any* non-property tax. The structural impulse to discriminate would be given an outlet that, driven by the enormous economic pressures of today, could quickly undo the protections Congress enacted.

This statutory context, to which *Norfolk Southern* turned a blind eye, makes plain that the court below fundamentally misread both Section 11501 and *ACF Industries*. Four further points confirm that.

*First*, because its reasoning expressly turned on how other provisions of the statute placed specific limits on *property* tax challenges, *ACF Industries*

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http://expandingcapacity.transportation.org/unlocking_freight/images/FreightReportFinal_7710.pdf.

[14] Those programs, which include direct federal loans and loan guarantees to finance rail infrastructure development, are described on the Federal Railroad Administration's website at http://www.fra.dot.gov/Pages/26.shtml.

has no relevance to the sales and use tax on diesel fuel challenged here. *See* CSX Br. 22-28. That no doubt was why "neither party briefed *ACF Industries* in depth" in *Norfolk Southern*. *See* 550 F.3d at 1313 (Pet. App. 26a). And that in turn may explain why, without the benefit of briefing, the Eleventh Circuit misapplied it.

*Second*, the Eleventh Circuit had it exactly backward in presuming that because "sales and use tax exemptions were ubiquitous at the time the 4-R Act was drafted . . . Congress' silence reflects a determination to leave such exemptions in place." *See id.* at 1315 (Pet. App. 30a). The fact Congress authorized continuation of *property* tax exemptions by expressly limiting the property tax comparison class used in subsections (b)(1)-(3) to commercial and industrial property "subject to a tax levy" in no way suggests that the comparison made to determine whether non-property taxes discriminate under subsection (b)(4) implicitly contains the same limitation. To the contrary, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotations and citation omitted)). The omission of any language or defined terms in subsection (b)(4) authorizing the continuation of exemptions from other state taxes such as sales and use taxes is persuasive evidence Congress did *not* protect the exemption at issue here.

*Third*, Alabama's diesel fuel tax is discriminatory even under *ACF Industries*. If the railroads, "either alone or as part of some isolated and targeted group" are the only comparable entities subject to a tax, the issue is not that other property has been "exempted" but rather that railroad property has been "singled out." *ACF Industries*, 510 U.S. at 346-47. That very situation is presented here. Alabama "conceded that '[i]n the instant case, no matter how the comparison class is framed, the comparison class consists of motor carriers and water carriers.'" Pet. App. 12a. And both motor carriers and those water carriers engaged in interstate or foreign commerce are exempt from Alabama's sales and use tax on diesel fuel. Viewed through the prism of the comparison class, it is clear that railroads are indeed an "isolated and targeted group" that has been singled out for the sales and use tax on diesel fuel, which would be a violation of the statute even with respect to property taxes. *See ACF Industries*, 510 U.S. at 346.[14]

*Finally*, the Eleventh Circuit's invocation of federalism was profoundly misplaced. It began by quoting what *ACF Industries* said about "principles of federalism": "'When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, [the Court is] hesitant to

[14] *Norfolk Southern* attempted to skirt this issue by noting that Alabama's sales and use tax applies to a handful of solely *intra*state water carriers (who do not compete with interstate railroads in any meaningful way) and to motor carriers that might hypothetically violate the law by failing to pay other taxes they owe. *See* 550 F.3d at 1316 (Pet. App. 32a-33a). That was sheer rationalization to avoid the fact this tax targets interstate railroads as compared to their competitors, and therefore violates Section 11501 even under *ACF Industries*.

extend the statute beyond its evident scope.'" 550 F.3d at 1314 (Pet. App. 28a-29a) (quoting 510 U.S. at 345). However, *Norfolk Southern* completely ignored the difference in Section 11501's "evident scope" with respect to property taxes as opposed to other taxes.

*ACF Industries* discussed at length the uncertainty regarding how subsection (b)(4) applies to property taxes that is created by express limitations on property tax relief in subsections (a)(4) and (b)(1)-(3). *See* 510 U.S. at 339-44. But there is no such uncertainty in applying subsection (b)(4) to a sales and use tax or other non-property tax. Nothing elsewhere in the statute creates any ambiguity about what constitutes discrimination when a property tax is not at issue. The law's plain text is clear and its "evident scope" is not limited in any way.

The Eleventh Circuit's bare assertion that "concerns for state sovereignty are just as keen" in this context, 550 F.3d at 1315 (Pet. App. 31a), is a hollow incantation that adds nothing to the analysis. It merely echoes another Eleventh Circuit panel that recently sought to limit Section 11501 based on *ACF Industries*' "principles of federalism," an argument this Court expressly rejected when it reversed that panel in *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9, 20-22 (2007).

What this Court said in 1987 when principles of comity were invoked to limit Section 11501 applies equally to the federalism arguments that the Eleventh Circuit has now twice raised: "These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we

are not free to reconsider them now." *Oklahoma Tax Comm'n*, 481 U.S. at 464.

## II. PROPERLY APPLIED, SECTION 11501 PROVIDES RELIEF FROM STATE TAX DISCRIMINATION WITH MINIMUM NECESSARY INTRUSION INTO STATE TAX POLICY CHOICES

Two Eleventh Circuit panels in a span of two years have sought to wield *ACF Industries'* narrow treatment of federalism as a broad tool to restrict very different Section 11501 claims. That in itself suggests some lower courts may harbor a fundamental misunderstanding of how the statute, properly applied, affects state taxing powers.

There is no question Congress intended to exercise its powers under the Commerce Clause to prohibit states from subjecting railroads—and the interstate commerce they carry—from discriminatory taxes.[5] It went on to provide an express exception from the Tax Injunction Act so that prohibition could be enforced in federal courts. *See* 49 U.S.C. § 11501(c). Congress set a clear and carefully focused limit on a state's freedom to adopt whatever taxes it might choose—one plainly warranted by the long history of discriminatory railroad taxes, the incentives that led to them and the results they fostered—to further the national interest. Here again, concerns about state sovereignty were weighed by Congress, and the line

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[5] As the United States puts it, "[t]he 4-R Act is preemptive in its design and by its broad, clear, and express terms." U.S. Br. in Support of Cert. 13 (citing *CSX Transp., Inc.*, 552 U.S. at 20-21).

it drew must be respected. *See Oklahoma Tax Comm'n*, 481 U.S. at 464.

Despite this express, well-justified congressional decision to stop states from imposing discriminatory taxes, interference with state prerogatives continues to be argued in efforts to limit Section 11501 claims. While that argument may be wrapped in the rhetoric of federalism, it ignores how Section 11501 was designed to and should operate.

Section 11501 does not mandate any specific way in which states must tax their residents or activities affecting them. It simply says that when a state decides to levy a tax, that tax cannot discriminate against interstate railroads.

The distinction is crucial: the normal remedy against a tax that violates Section 11501 is to enjoin the state from collecting that specific tax from the railroad. Unless a tax applies solely to railroads, it continues to apply to other taxpayers while its discriminatory application to railroads is enjoined. Other, non-discriminatory taxes are not affected.

This focused remedy makes the smallest possible intrusion into state taxing activities in the interest of overriding national concerns. State legislators can correct the problem by eliminating the discrimination against railroads, but even if they do not, federal law blocks only a narrow sliver of their overall tax regime—the application of a specific tax to interstate rail carriers.

Courts enforcing Section 11501 have carefully kept this narrow focus. Consistent with the statutory text prohibiting "a tax" and "another tax," 49 U.S.C.

§ 11501(b)(2) & (4), they have confined both the analysis and the relief to the specific tax at issue.

For example, in *Kansas City S. Ry. v. McNamara*, 817 F.2d 368 (5th Cir. 1987)—a case brought under subsection (b)(4)—the Fifth Circuit rejected a state's urging to look beyond the specific tax challenged:

> The 4-R Act precludes the difficult analysis that the [state] requests. The statute speaks in simple and categorical terms about property tax rates and assessments, § [11501](b)(1)-(3), then prohibits "another tax that discriminates against a rail carrier . . . ." § [11501](b)(4). The focus is on particular taxing entities—"a State, subdivision of a State, or authority acting for a State or subdivision"—and particular assessments and particular taxes. There is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state.

*Id. at* 377 (footnote omitted). As the Fifth Circuit explained, "the categorical language of the 4-R Act demands bright-line rules for simple judicial administration." *Id.* at 378 (expressing agreement with *Gen. Am. Transp. Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986)).

Other courts of appeals have reached the same conclusion. The Eighth Circuit has repeatedly rejected state attempts to broaden the inquiry—and potential interference with state taxing power—beyond the specific tax being challenged. *See Union Pac. R.R. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N. & Santa Fe Ry. v.*

*Lohman*, 193 F.3d 984, 986 (8th Cir. 1999); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302-03 (8th Cir. 1991); *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 209-10 (8th Cir. 1981). The Seventh Circuit endorsed the analysis in *Kansas City Southern Railway* and *Trailer Train* with the observation that "[r]eading subsection (b)(4) of our statute in light of the approach taken in the first three subsections, we infer a congressional desire that courts avoid the thicket of incidence analysis and forbid states to single out railroads for taxation." *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186-88 (7th Cir. 1991). The Sixth Circuit also has adopted this consensus view, holding that "'[u]nder a 4-R Act analysis, a reviewing court need not consider the state's entire tax structure—just an analysis of the individual tax imposed by the taxing entity alleged to be discriminatory.'" *Gen. Amer. Transp.*, 791 F.2d at 41 (quoting district court decision affirmed).[16]

As these decisions reflect, the issue has usually arisen when a state has sought to justify a tax that discriminates against railroads by saying other taxes offset the discrimination—a question AAR recognizes is not before the Court here.[17] But it is tightly bound

[16] Two state supreme courts are also in accord. *Burlington N. & S.F. v. Comm'r of Revenue*, 509 N.W.2d 551, 554 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 346 (Iowa 1983). The Eleventh Circuit itself declined "to look past the particular tax at issue to analyze the overall state tax structure" in considering whether Alabama subsidized motor carriers. *Norfolk Southern*, 550 F.3d at 1318 (Pet. App. 36a).

[17] AAR observes, however, that this unanimous consensus of the courts of appeals is contrary to the view expressed by the government in its brief supporting certiorari. *See* U.S. Br. in

with the federalism concerns the Eleventh Circuit invoked in *Norfolk Southern*.

Nothing makes that clearer than this Court's decision in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). *Snead* considered a provision of the Tax Reform Act of 1976—enacted by the same Congress as the 4-R Act—that prohibited states from imposing "a tax" on electricity if it discriminated against out-of-state parties. *See id.* at 146. The state argued the prohibition was invalid under the Commerce Clause, contending that the constitutional test "require[d] examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of State." *Id.* at 149. This Court disagreed:

> To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute, but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

*Id.* at 149-50 (footnote omitted). The Court went on to conclude that the law was within the power of Congress under the Commerce Clause because it

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Support of Cert. 17 & n.8. Even though the Acting Solicitor General correctly noted that the issue is not before the Court, it is important to emphasize that the government's view was misinformed and that it did not address any of the multiple grounds on which the courts of appeals have rested their decisions limiting the inquiry to the specific tax challenged.

prohibited a tax that "interfered with interstate commerce" and used "a reasonable method to eliminate that interference." *Id.* at 150.

*Snead's* teaching applies to federal-state relations under Section 11501 as well.[18] By narrowly focusing the law's analysis and relief on the particular tax at issue, Congress minimized the impact on state prerogatives, doing only what it found necessary to eliminate interference with interstate commerce.

Section 11501 is fully consonant with principles of federalism exactly as Congress wrote it. There is no warrant in those principles for limiting what the plain text of the statute requires, including subsection (b)(4)'s catch-all prohibition of "another tax that discriminates against a rail carrier."

## III. THE ELEVENTH CIRCUIT'S DECISION INVITES A RESURGENCE OF DISCRIMINATORY STATE TAXES ON RAILROADS AND, THROUGH THEM, ON INTERSTATE COMMERCE

The impulses that prompt state and local governments to pursue sources of tax revenue other than their own voters have not abated since the 4-R Act was passed. Even though Congress laid down bright-line rules, there have been continual efforts to evade them. In times such as this, with tax revenues reduced by general economic conditions, those efforts are even more frequent. A few examples of what

[18] Two courts of appeals have cited *Snead* as support for limiting the Section 11501 analysis to the specific tax being challenged. *See Trailer Train Co.*, 929 F.2d at 1302-03; *Kansas City S. Ry.*, 817 F.2d at 476.

railroads have encountered recently illustrate the variety of techniques by which states and localities persistently seek some way around Section 11501.

A.

One of the most egregious is the effort last year by a levee drainage district in Illinois to make railroads pay a hugely disproportionate share of its budget shortfall. *See Kansas City S. Ry. v. Borrowman*, No. 09-3094, 2010 WL 1849844 (C.D. Ill. May 6, 2010), 2010 WL 2178699 (C.D. Ill. May 28, 2010), *appeal pending sub nom. Kansas City S. Ry. v. Koeller*, No. 10-2333 (7th Cir.). Prior to 2009, Sny Island Levee Drainage District divided its operating budget by the number of acres it benefitted and assessed a per-acre fee, subject only to a per-tract elevation adjustment. Under that system, land owned by railroads was taxed exactly the same as land owned by any other taxpayer. However, flooding in the first half of 2008 caused the district to incur unusually high expenses, which the revenue from existing tax assessments was insufficient to cover. At that point, instead of simply raising taxes for all landowners the district devised a new assessment method, placing railroads, pipelines and for-profit utilities in a separate category to be taxed on a "benefit basis."

The taxes on other landowners, including owners of other commercial and industrial property, went up $10 per acre. Had railroads been taxed in the same manner, Kansas City Southern's tax would have grown from $1,773.94 to $3,897.14. But under the new "benefit" scheme, its tax rose to $85,541.26 – an astounding 4,700%. Norfolk Southern's tax rose an even more astonishing 8,000%, from $1,126.50 to $93,917.34. *See* 2010 WL 1849844 at *3. The

district court's refusal to enjoin collection of the inflated tax on the railroads is currently being briefed to the Seventh Circuit.

B.

The City of Vernon, California enacted a "parcel tax" imposed only on "non-refrigerated warehouses, truck terminals, freight terminals or other distribution facilities." *See* Order at 2, *Burlington N. & Santa Fe Ry. v. City of Vernon*, No. CV00-12891 (C.D. Cal. Aug. 7, 2003) (order granting permanent injunction), ECF No. 151. BNSF challenged that tax, and the district court properly concluded the city had "taxed railroads 'as part of some isolated and targeted group'" in violation of subsection (b)(4). *Id.* at 17-18 (quoting *ACF Industries*, 510 U.S. at 347-48). The parcel tax was therefore permanently enjoined. *Id.*

C.

States also have tried to find "backdoor" measures to extract additional tax revenues from railroads. In 2006 Kansas enacted a 2.5 percent tax on the gross receipts of car line companies that own rail cars supplied for railroad operations there.[19] The burden of that tax obviously would have been borne by the railroads. TTX, the largest car line company, challenged the tax under subsection (b)(4). The state did not even attempt to defend: instead, it reached a settlement in which it agreed to a consent permanent injunction. *See* Consent Permanent Injunction, *TTX*

[19] The fact that a similar Missouri tax on rail car rental revenue had been enjoined under Section 11501 some fifteen years earlier, *Trailer Train Co.*, 929 F.2d at 1301-02, apparently had no impact on the Kansas legislature.

*Co. v. Kan. Dep't of Revenue*, No. 5:09-cv-04019-JAR/JPO (D. Kan. Mar. 17, 2009), ECF No. 10.

D.

Even states with abundant natural resources that offer an ample tax base yield to the temptation to seek revenue from the railroads transporting those resources rather than the resources' owners. A double-barreled Wyoming effort targeting railroads is illustrative.

Wyoming is the Nation's largest producer of coal. In 2008, its twenty mines produced over 467 million short-tons—almost 40 percent of total U.S. coal production.[20] That coal is shipped to utilities in the Midwest, Mid-South, Southwest, Northeast and Southeast, virtually all by rail.

In 2000 the Wyoming legislature enacted two laws imposing taxes on railroads: a Train Mile Tax and a Coal Transportation Tax. The Train Mile Tax on its face applied only to railroads—a per se violation of Section 11501. *See Burlington N. & Santa Fe Ry. v. Dover*, No. 00-CV-109-J (D. Wyo. Apr. 25, 2003) (order granting permanent injunction).

The Coal Transportation Tax was more inventive. It applied to "anyone commercially transporting coal in Wyoming." *Burlington N. & Santa Fe Ry. v. Atwood*, 271 F. Supp. 2d 1359, 1363 (D. Wyo. 2003). However, it was undisputed that well over 99% of the coal transported in Wyoming moved by rail. In the tax year at issue, BNSF and UP carried 356 million tons of coal in Wyoming, whereas all other carriers

---

[20] U.S. Energy Info. Admin., *Ann. Coal Rep. 2008*, Mar. 2010, at 10, http://www.eia.doe.gov/cneaf/coal/page/acr/acr.pdf.

combined accounted for only 1.5 million tons. *Id.* at 1362. The total tax burden for the railroads would have been over $5.7 million, compared to less than $19 thousand for non-rail carriers. *Id.*

The district court had no difficulty concluding that this tax "single[d] out railroads" and thus violated Section 11501. *Id.* at 1367. But Wyoming's attempted justification was revealing. It argued the Coal Transportation Tax was merely "designed to tax one of Wyoming's principal resources, coal." *Id.* Rejecting that argument, the district court pointedly observed: "If the legislature truly desired to achieve maximum tax benefit from taxation of one of this State's primary natural extractive resources, it could do so easily, without resulting in a discriminatory tax on railroads, simply by increasing or otherwise modifying the severance taxes imposed on coal, for example." *Id.* That, of course, was precisely what the legislature was trying to avoid—by shifting the tax burden onto out-of-state railroads.

E.

Oklahoma recently adopted a new Business Activity Tax.[21] That new tax is "in lieu of any and all other taxes imposed by the state" or its subdivisions "on intangible personal property"—"*except* for public services corporations, *railroads*, and air carriers." *Id.* § 5.F (emphasis added.) In other words, while all other businesses except air carriers and public service corporations pay only the new tax and are relieved of any personal property tax on intangibles, railroads now pay *both* the new tax *and* substantial

---

[21] *See* Enr. S.J. Res. 61, 52nd Leg., 2d Sess. § 5 (Okla. 2010), *http://webserver1.lsb.state.ok.us/2009-10bills/SB/sjr61_enr.rtf*

taxes on intangibles. A more blatant violation of Section 11501 is difficult to imagine.

F.

Finally, taxes on railroad diesel fuel such as the tax at issue here present recurring problems. While railroads use fuel very efficiently, they nonetheless use it in large volume, making it an attractive tax target. In addition to six cases already decided by the lower courts, a challenge to Tennessee's sales and use tax on diesel fuel is now before a federal district court, which has stayed further proceedings pending the decision in this case. *Ill. Cent. R.R. v. Tenn. Dep't of Revenue*, No. 3:10-CV-00197, (M.D. Tenn. June 29, 2010) (order staying proceedings), ECF No. 16.

* * * *

As these examples illustrate, more than thirty years after it was enacted states and localities are still actively seeking ways to evade Section 11501's clear and simple mandate: that their taxes not discriminate against railroads. The continuing proliferation of taxes designed to shift tax burdens away from local residents and onto the railroads confirms the continued need for strict enforcement of this law—for the protection of not only the railroads but also shippers and customers in other states. A clear ruling that discrimination cannot be accomplished by manipulating exemptions from sales and use taxes or other non-property taxes will help deter states and localities from further efforts to evade a ban that Congress enacted to benefit the entire national economy.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for trial on the merits.

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# AMICUS CURIAE BRIEF

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IN THE
# Supreme Court of the United States

CSX TRANSPORTATION, INC.,
*Petitioner*,

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.[1] COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state. While COST's membership includes the major railroad providers—which are directly impacted by an interpretation of the statutory provision at issue—our broader company membership is concerned about the ramification this case will have on the validity and effectiveness of many other federal laws protecting interstate commerce from discriminatory and unduly burdensome state taxation.

## SUMMARY OF THE ARGUMENT

The 4-R Act sets forth prohibitions on discrimination and an avenue for relief in federal court that were intended to relieve railroad property from acts of discriminatory taxation by state and local governments. For Congress' words to have meaning, taxpayers must have the ability to challenge state discrimination whether it is accomplished by granting exemptions to favored competitors or by imposing a targeted tax. To hold otherwise eviscerates the purpose of the 4-R Act and jeopardizes the legitimacy of numerous other federal acts impacting state and local taxation.

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

## ARGUMENT

### I. FAILURE TO READ 49 U.S.C. § 11501(b)(4) TO PROHIBIT TARGETED EXEMPTIONS FOR RAILROAD COMPETITORS WOULD EVISCERATE THE FUNDAMENTAL PURPOSE BEHIND THE STATUTE.

Tiring of complaints of "studied and deliberate"[2] state and local tax discrimination against railroads, Congress passed the Railroad Revitalization and Regulatory Reform Act in 1976 ("4-R Act"), 49 U.S.C. § 11501 (2010). Congress enacted the 4-R Act in part to protect railroads which "'are easy prey for State and local assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Airlines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987) (quoting S. Rep. No. 91630, p. 3 (1969)). The purpose of Section 11501 "was to prevent tax discrimination against railroads in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert denied*, 454 U.S. 1086 (1981). *See also Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("The legislative history and broad language of [§ 306] show Congress possessed a general concern with discrimination in all its guises . . . .") (quoting *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Circ. 1983)).

The 4-R Act specifies four prohibited activities which, if done by a state or local taxing authority, are considered to be discriminatory and an unreasonable

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[2] S. Rep. No. 87-445, at 458 (1961).

burden on interstate commerce. The Act does not allow states or localities to:

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b) (2010).

The purpose of these four prohibitions is clear from their language: to prohibit discrimination caused by inflating railroad property assessed values (compared to their true values); to prohibit the levy or collection of tax based on these inflated values; to prohibit discrimination by imposing higher tax rates on railroad property; and to prohibit any other tax that discriminates against railroads. Of these four prohibitions only the last, and Congress' intention in that regard, is relevant to the present case.

Congress sought by § 11501(b)(4) to prohibit sub-national tax jurisdictions from enacting non-property taxes that discriminate against railroads. In crafting a statutory formula to determine whether the taxing authority had engaged in tax discrimination against railroads, Congress chose broad but nonetheless specific language to prohibit "another tax that discriminates" tax. What the Eleventh Circuit held was that when it comes to non-property taxes, Congress never intended to prohibit favorable exemptions to a generally applicable tax—even if the exemptions apply to the core group of railroad competitors. For the discrimination provision in section 11501(b)(4) to have the full meaning and protection Congress intended, tax exemptions must be scrutinized even if the exemption are to a seemingly generally applicable tax. Discrimination through the use of targeted exemptions is no less distasteful than discrimination though the imposition of a targeted tax.

The Eleventh Circuit suggests that this Court's holding in *Department of Rev. v. ACF Industries*, 510 U.S. 332 (1994), somehow supports Alabama's arguments that exemptions can discriminate as long as they are an exemption from a generally applicable tax. However, Alabama has "singled out" railroads from their competitors by imposing a tax which it does not impose on other competing taxpayers in the State of Alabama. In *ACF Industries*, this Court expressly stated that the case before it did not present such facts.

In *ACF Industries*, the Court concluded "that a state may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection [(b)(4)]." *Id.* at 340. In reaching this con-

clusion, the Court focused its analysis on state-granted exemptions from otherwise generally applicable property tax schemes and their relationship to the 4-R Act. The Court first examined Section 11501 as a whole. It found that "[e]xempt property . . . is not part of the comparison class against which discrimination is measured under subsections [(b)(1)-(3)]" and that congress would not have allowed "the States to grant property tax exemptions in subsections [(b)(1) (3)]" and then "turn around and nullify its own choice in subsection [(b)(4)]." *Id.* at 333.

The Court then cited other considerations, all of which focused on property tax exemption, to reinforce its construction of the statute. The Court then noted:

> Given the prevalence of property tax exemptions when congress enacted the 4-R Act, § 11503's silence on the subject - in light of the explicit prohibition of tax rate and assessment ratio discrimination - reflects a determination to permit the states to leave their exemptions in place.

*Id.* at 344.

The Court's analysis makes it clear that the *ACF Industries* decision was limited to situations involving state-granted exemptions "from a generally applicable ad valorem property tax." Indeed, the Court distinguished situations like those in the present case where a railroad is "singled out" for the imposition of a discriminatory tax and stated its decision was not intended to deal with such situations.

> [T]his is not a case in which the railroads—either alone or as part as some isolated and targeted group—are the only commercial entities subject to an ad valorem property tax . . . . If such a case

> were to arise, it might be incorrect to say that the state "exempted" the nontaxed property. *Rather, one could say that the state had singled out railroad property for discriminatory treatment.*

*Id.* at 346-47 (emphasis added).

CSX challenged Alabama's imposition of sales and use tax on its purchases because it, and other railroads, are the only significant taxpayers in a group of competing taxpayers in Alabama who have to pay the tax. Unlike the Oregon tax scheme addressed in *ACF Industries*, the Alabama taxing scheme challenged in this case simply does not involve broad property tax exemptions that cross different industries.

The record in the present action makes it clear that Alabama has, in fact, "singled out railroad property for discriminatory treatment" by imposing the sales tax at issue only upon fuel purchased by railroads, but not competitors. Thus, the logic of *ACF Industries* should not preclude entry of judgment in favor of CSX on its claims in this case under subsection (b)(4).

## II. THE ELEVENTH CIRCUIT'S EXTENSION OF THE *ACF INDUSTRIES* EXEMPTION RULE WOULD JEOPARDIZE MANY OTHER FEDERAL STATUTORY PROVISIONS GOVERNING STATE AND LOCAL TAX.

The Eleventh Circuit's aggressive extension of the *ACF Industries* exemption rule where there are targeted exemptions could jeopardize many other federal statutory provisions governing state and local tax. As seen above, the Eleventh Circuit's approach

requires Congress to clearly spell out that discriminatory taxation can occur by granting targeted exemptions or those challenges will be foundto be disallowed by *ACF Industries*. This overlystrict approach, if applied to other federal legislation impacting state and local tax, could undermine the entire purpose behind such legislation. *ACF Industries'* blessing of exemptions in limited circumstances should be applied cautiously lest it destroy the intent of Congressional legislation meant to solve significant problems in the state and local tax arena.

Congress has, serving in its role as the protector of interstate commerce, intervened in the world of state taxation numerous times to protect, clarify, and foster uniformity in state tax treatment of multistate transactions and enterprises. These legislative inroads on state sovereignty are limited to circumstances where Congress has heard repeatedly from national stakeholders that the problems existing in our sub-national tax structure require a federal solution. Often, the Congressional interventions come in the form of a ban on discriminatory taxes. Some of the examples of the nearly 30 federal laws that could be eviscerated by the Eleventh Circuit's interpretation of *ACF Industries* include:

Discriminatory Airline Taxation

This statute prohibits states from levying or collecting a tax on "(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b) (2010). The statute adopts language similar to the prohibition against discrimination found in the 4-R Act. The statute prohibits states from the

following acts based on a conclusion that these acts unreasonably burden and discriminate against interstate commerce.

States are not permitted to:

> (i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.
>
> (iii) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (iv) levy or collect a tax, fee, or charge, first taking effect after August 23, 1994, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

49 U.S.C. § 40116(2)(A) (2010).

The language of § 40116(2)(A)(iv) is similar to the language at issue in this case under § 11501(b)(4) in that it applies to taxes imposed "exclusively" upon certain businesses operating in airports. A ruling in this case could therefore impact the protections Congress afforded airport businesses under § 40116.

Taxation of Energy Generation

Congress preempted state taxes on or with respect to the generation or transmission of electricity if such tax discriminates against out-of-state manufacturers, producers, wholesalers, retailers or consumers of that electricity. The provision specifies that a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. 15 U.S.C. § 391 (2010).

Taxation of Outer Continental Shelf Activities

Congress adopted a broad protection of oil and gas companies from state taxation of their activity on the Outer Continental Shelf. The statute says simply that "State taxation laws shall not apply to the Outer Continental Shelf." 43 U.S.C. § 1333(a)(2) (2010).

Prohibition of Income Taxes

Congress preempted state income taxes on companies whose sole activity in a state is the solicitation for sales of tangible personal property. 15 U.S.C. § 381 (2010).

Taxation of Stock Transfers

Congress preempted state taxation of change in beneficial or record ownership of securities when such state taxation was asserted based on the physical location of the agent handling the transfer. 15 U.S.C. § 78bb(d) (2010).

Taxation of Satellite Service

Congress prohibited local tax jurisdictions from requiring direct-to-home satellite television service providers to collect or remit "any tax or fee imposed

by any local taxing jurisdiction on direct-to-home satellite service." Pub. L. No. 104-104, Title VI, § 602(a) (reprinted at 47 U.S.C. § 152 (2010), historical and statutory notes).

Taxation of Passengers on Motor Carrier

Congress prohibited states from imposing "a tax, fee, head charge, or other charge on inter-state passenger transportation by motor carrier." 49 U.S.C. § 14505 (2010).

Taxation of Internet Access

Congress prohibited states from imposing any tax on internet access charges or any multiple or discriminatory tax on electronic commerce. Pub. L. 110-108, §§ 2 to 6 (reprinted at 47 U.S.C. § 151 (2010), historical and statutory notes).

Mobile Telecommunications Sourcing

Congress established uniform nationwide sourcing rules for state and local taxation of mobile telecommunications services. 4 U.S.C. §§ 116-126 (2010).

Each of these statutory provisions reflects a Congressional intent to protect interstate commerce from undue burdens and from discriminatory taxation. Unless the Eleventh Circuit's decision is corrected, each of these statutory provisions could be subject to unexpected litigation seeking to limit the impact of Congressional action by applying the Eleventh Circuit's rule allowing discriminatory exemptions as way to make an end run against the Congressional prohibitions.

In addition to the existing laws identified above, numerous bills are pending in Congress which would be subject to the intense scrutiny of the Eleventh Circuit's rule allowing discriminatory exemptions.

These bills have been drafted with the understanding that it is not necessary for Congress to expressly describe every possible means the states could use to circumvent the purpose of the bill. Without relief from the Eleventh Circuit's holding, the drafting of each of these bills would need to be evaluated.

Legislation has been introduced which seeks to prohibit states from imposing business activity taxes on companies that do not have a certain level of physical presence in the state. Business Activity Simplification Act of 2009, H.R. 1083, 11th Cong. (2009).

Legislation has been introduced which seeks to establish standards under which states could require remote sellers to collect sales and use tax on sales into the state and which creates jurisdiction in the Court of Federal Claims to hear certain disputes arising under the legislated standards. Main Street Fairness Act, H.R. 5660 11th Cong. (2010).

Legislation has been introduced which would impose a three-year moratorium on new, discriminatory state or local taxes on cell phone services, property or providers. Cell Tax Fairness Act of 2009, H.R. 1521, 11th Cong. (2009).

Legislation has been introduced which would adopt language similar to that of the 4-R Act forbidding discrimination against the taxation of digital goods. The legislation would also create jurisdiction in the district courts to hear disputes. Digital Goods and Services Tax Fairness Act of 2010, H.R. 5649, 11th Cong. (2010).[3]

[3] This is list is not intended to be comprehensive, but only representative. Numerous other bills are introduced in each

State discrimination against interstate businesses is a growing problem for businesses struggling to compete in an increasingly competitive global business environment. The result has been an increasing cry for federal legislation establishing uniform rules and protections for commerce among the states. The question raised by the present case is quite simply, how specific does Congress have to be when it legislates to protect interstate commerce from antiquated and discriminatory local tax laws? While that question may not be susceptible to a precise answer, it is perfectly clear that Congress's prohibition against unlawful discrimination applies whether it comes in the form of a targeted imposition or a targeted exemption.

## CONCLUSION

The 4-R Act sets forth prohibitions on discrimination and an avenue for relief in federal court that were intended to relieve railroad property from acts of discriminatory taxation by state and local governments. For Congress' words to have meaning, taxpayers must have the ability to challenge state discrimination whether it is accomplished by granting exemptions to favored competitors. To hold otherwise eviscerates the purpose of the 4-R Act and jeopardizes the legitimacy of numerous other federal Acts impacting state and local taxation.

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Congress that seeks to limit the way state and local governments tax multistate taxpayers. *See e.g.*, Mobile Workforce State Income Tax Fairness and Simplification Act, H.R. 2110, 111th Cong. (2009); To Prohibit a State from Imposing a Discriminatory Commuter Tax on Nonresidents, and for Other Purposes, H.R. 117, 111th Cong. (2009).

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# AMICUS CURIAE BRIEF

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CSX TRANSPORTATION INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE AND CYNTHIA UNDERWOOD, ASSISTANT REVENUE COMMISSIONER,

*Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS


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## BRIEF OF MULTISTATE TAX COMMISSION as *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

## INTEREST OF THE AMICUS CURIAE

*Amicus curiae* Multistate Tax Commission respectfully submits this brief, first, in support of neither party with respect to a threshold question of whether 49 U.S.C. §11501(c) of the Railroad Revitalization and Regulatory Reform Act permits the exercise of federal jurisdiction to review claims brought under §11501(b)(4). Should this Court determine the exercise of federal jurisdiction was improper, this case should be dismissed.

The Commission also writes in support of the State of Alabama that, should this Court determine the exercise of federal jurisdiction was proper, the decision of the Eleventh Circuit should be affirmed.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Alabama. Finally, this brief is filed with the consent of the parties.

in 1967. *See, United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia are members of the Commission.[2]

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. *Multistate Tax Compact*, Art. I. These purposes are central to the very existence of the Compact, which was the states' answer to an urgent need for reform in state taxation of interstate commerce. *See, H.R. Rep.* No. 89-952, Pt. VI, at 1143 (1965) *and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the*

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[2] *Compact Members:* Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members:* Georgia, Kentucky, Louisiana, New Jersey, and West Virginia. *Associate Members:* Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

*Judiciary*, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax). If the states failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate important aspects of state taxation. Preserving state tax sovereignty under our vibrant federalism remains a key purpose of the Compact and the Commission.

The Commission's interest in this case arises from our purpose of preserving the states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that which is clearly mandated by Congress.

## SUMMARY OF ARGUMENT

The Commission argues, as a preliminary matter, that 49 U.S.C. §11501(c) does not abrogate the Tax Injunction Act (TIA), 28 U.S.C. §1341, to grant federal district court jurisdiction over alleged violations of §11501(b)(4). In its grant of federal jurisdiction over §11501(b) claims, the plain language of subsection (c) limits relief to discriminatory property tax assessments that exceed a certain threshold. The language does not support broad federal jurisdiction over claims arising under subsection (b)(4) as "another tax that discriminates." The legislative history bears this out. Congress's analysis and findings regarding §11501(c) discussed property taxes only, and focused on procedures that are almost solely related to state property taxation.

Two federal circuit courts addressed the jurisdictional question and mistakenly determined it would be inconsistent to give the §11501(c) limitation its plain meaning in light of the sentence that precedes it, which grants federal jurisdiction "to prevent a violation of subsection (b)." Both courts misapprehended Congress's intent and concluded that depriving federal court jurisdiction to review alleged violations of rights arising under §11501(b)(4) would lead to an "absurd" result. But the result would not be absurd. It is not unusual for Congress to grant a federal right, yet leave the remedy for a violation of that right to state courts. It should not be assumed that because subsection (b)(4) was added late, Congress made a mistake which it would have corrected by expanding subsection (c) to cover the subsection (b)(4) addition. Rather, if any assumption needs to be made, it should be the opposite – that Congress would have clarified that subsection (b)(4) is *not* covered under subsection (c).

If there is any doubt regarding the express limitation of §11501(c) or its legislative history, principles of federalism require the narrow interpretation should control. Allowing federal courts to enjoin state taxes for alleged subsection (b)(4) violations would vastly expand the federal courts' jurisdiction from review of specific and limited challenges to a single type of state tax to challenges of discrimination with respect to all applicable state taxes. This expansive interpretation is not supported by the language of the 4-R Act or its legislative history. The narrow interpretation is not

unreasonable, is supported by legislative history, and is consistent with the statute's plain language. Should this Court determine the exercise of federal jurisdiction was improper, this case should be dismissed.

If this Court finds that the federal district court did have jurisdiction, however, then the reasoning of the Eleventh Circuit in *Norfolk Southern Railway* v. *Alabama Department of Revenue*, 550 F.3d 1306 (11th Cir. 2008) should be upheld. It is supported by the plain language of the Act. As this Court found in Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 342 (1994), the Act does not include exemptions in determining whether a property tax "discriminate[s]" under (b)(1)-(3). Rules of statutory construction hold that the same words in different parts of a statute should be given the same meaning, and there is no basis for re-defining the term "discriminate" more broadly for purposes of evaluating whether "another tax ... discriminates" under (b)(4).

Including tax exemptions in the evaluation of discrimination for purposes of §11501(b)(4) would not only conflict with the tailored definition of prohibited "discriminate[ion]" that Congress enacted in subsections (b)(1)-(3), but also with Congress's express legislative objective of putting railroads on equal footing with other state taxpayers. Allowing railroads to claim the exemption would serve no state legislative purpose and, contrary to the federal legislative purposes, would put railroads at a distinct advantage over every other state taxpayer, including

competitors. Congress made a balanced policy choice to exclude exemptions and this choice should not be disturbed.

## ARGUMENT

In §11501(b) of the Railroad Revitalization and Regulatory Reform Act (4-R Act), Congress listed three carefully and narrowly defined "acts" related to state property taxation that it found — after 15 years of analysis — "unreasonably burden and discriminate against interstate commerce":

> (b)(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property; [3]
>
> (b)(2) levy or collect a tax on an assessment that may not be made under paragraph (b)(1);

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[3] "Commercial and industrial property" is defined as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." §11501(a)(4).

> (b)(3) levy or collect an ad valorem tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction;[4]

4-R Act §11501(b)(1)-(3)

Shortly before the 4-R Act was adopted, Congress identified a fourth act that "a state may not do":

> (b)(4) impose another tax that discriminates [against a rail carrier providing transportation in interstate commerce].

4-R Act §11501(b)(4)

Subsection (c) of the Act provides an exception to the Tax Injunction Act, 28 U.S.C. §1341, allowing federal district courts jurisdiction "to prevent a violation of subsection (b)." But the subsection contains a limitation that:

> [r]elief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

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[4] "Assessment jurisdiction" is defined as "a geographical area in a State used in determining the assessed value of property for ad valorem taxation." §11501(a)2).

§11501(c)

CSX Transportation Inc. (CSXT) filed this action in federal district court to enjoin the State of Alabama from collecting its generally-imposed sales and use taxes on CSXT's purchases of diesel fuel for use in its train engines. CSXT contends that these state taxes are each "another tax that discriminates" within the meaning of §11501(b)(4) because motor carriers and water carriers, competitors of CSXT, qualify for sales and use tax exemptions on their purchases of fuel.[5] Alabama, like most states, exempts purchases of diesel fuel if those purchases are also subject to the state's motor fuel excise tax, another generally-imposed transaction tax applicable to purchases of motor fuel for highway use.[6] And Alabama exempts fuel used by vessels engaged in interstate or foreign commerce.[7] The diesel fuel that CSXT purchases for use in its locomotive engines is not used in a vessel and is not subject to the state's motor fuel tax. Thus, CSXT is not exempt from the state's sales or use taxes on those purchases.

This case comes to the U.S. Supreme Court with very little litigation having taken place between the parties beyond the preliminary injunction stage. Within 90 days of filing its action, CSXT moved for a preliminary injunction prohibiting Alabama from

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[5] Brief of Petitioner, p.8.

[6] Ala. Code 1975 §§40-17-2(1), 40-17-220(e). For citations to other states' statutory exemption, see footnote 18.

[7] Ala. Code 1975 §40-23-4(10).

collecting its sales or use taxes on CSXT's diesel fuel purchases.[8] And within another 90 days, the federal district court granted that motion. The district court then stayed further proceedings pending the Eleventh Circuit's decision in a case brought by a different taxpayer challenging the same statutes on the same grounds, *Norfolk Southern Railway* v. *Alabama Department of Revenue*, 550 F.3d 1306 (2008).[9] Within a week after the Eleventh Circuit issued its opinion in *Norfolk Southern* v. *Alabama Department of Revenue* upholding the Alabama sales and use tax, the federal district court vacated its preliminary injunction and dismissed CSXT's complaint.[10] CSXT appealed, seeking an initial hearing *en banc*, which was denied, and the panel soon affirmed the district court's judgment, recognizing that it was "bound" by *Norfolk Southern*. CSXT then petitioned, and was granted, a writ of *certiorari* to this Court.

This Court now asks a threshold question of whether "a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. §11501(b)(4)... " As a preliminary matter, the Commission respectfully requests this Court consider an additional threshold question of whether the federal district court had jurisdiction to review and enjoin

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[8] J.A. 29-31

[9] *CSX Transportation, Inc.* v. *Alabama Department of Revenue*, No. 2:08-cv-0655-UWC (N.D. Ala. July 8, 2008).

[10] *CSX Transportation, Inc.* v. *Alabama Department of Revenue*, No. 2:08-cv-0655 UWC (N.D. Ala. December 16, 2008).

the operation of Alabama's generally-imposed sales and use taxes. The jurisdictional issue was not raised or considered below. Since the issue relates to subject matter jurisdiction, however, it is proper to address it at this time. *Grupo Dataflux* v. *Atlas Global Group, L. P.*, 541 U.S. 567, 571 (2004). If this Court finds that the federal court did not have jurisdiction, then the case should be dismissed. But, if this Court finds that the federal court did have such jurisdiction, then the reasoning of the Eleventh Circuit decision in *Norfolk Southern* should be upheld.

## I. Congress Did Not Exempt Claims Brought under §11501(b)(4) from the Tax Injunction Act.

### A. The Plain Language of §11501 and Its Legislative History Indicate Congress Did Not Intend to Create an Exception to the Tax Injunction Act for Claims Brought Under §11501(b)(4).

Ordinarily, the Tax Injunction Act (TIA) bars federal court jurisdiction to enjoin the "assessment, levy, or collection" of a state tax, as long as the state provides a "plain, speedy, and efficient" remedy. Even when a state tax is claimed to violate a federal statute, the TIA deprives federal courts of jurisdiction to enjoin the tax so long as state tax refund procedures provide an adequate opportunity for the taxpayer's claim to be raised and considered. *See, Franchise Tax Board* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 341 (1990); *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981); *Tully* v. *Griffin,*

429 U.S. 68 (1976). In requesting an injunction of Alabama's generally imposed sales and use tax on CSXT's diesel fuel, CSXT did not assert that the remedies provided by the State of Alabama are inadequate in any way. Rather, CSXT noted that section §11501(c) of the 4-R Act creates an exception to the TIA "allowing railroads to challenge discriminatory taxation in federal district courts."[11]

But the grant of jurisdiction under subsection (c) contains a plain limitation:

> Relief may be granted under this subsection *only* if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

§11501(c) (emphasis added)

This limitation is clear on its face. It restricts federal court jurisdiction to those claims alleging discriminatory state acts that would generally arise under §11501(b)(1) and (2), and then only if the discrimination exceeds a specific threshold.

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[11] Brief for Petitioner, fn 4, p.8, *citing to Burlington Northern Railroad Co.* v. *Oklahoma Tax Comm'n.*, 481 U.S. at 457-58 (1987), which did not deal with a controversy arising under (b)(4).

The limitation indicates Congress did not intend to grant federal courts broad jurisdiction to enjoin violations under §11501(b)(4), which prohibits states from "imposing another tax that discriminates" against rail carriers. Indeed, in its brief submitted to this Court in *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 510 U.S. 332 (1994), The United States' Solicitor General pointed out that "...this provision does not, by its terms, apply to the discrimination proscribed by subsection (b)(4)...", Brief for United States at 23, *ACF Industries, Inc.* (No. 92-74).[12]

The legislative history of §11501(c) supports this plain meaning. Throughout the 4-R Act's legislative history, Congress's analysis and findings regarding §11501(c) discussed property taxes only, and focused on burdens that arose from procedures uniquely present in state property taxation. Regarding a bill that addressed only state property tax discrimination and did not include subsection (b)(4) language, the Senate reported that:

> The testimony before the committee indicated that present State procedures to challenge discriminatory State tax assessments are often difficult, time consuming, and not productive of material relief. For example, the Southern Pacific and its rail affiliates *were required to bring 48 separate suits in 48 separate California superior courts to challenge the level*

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[12] The Solicitor General goes on, however, to argue that the language should be interpreted as a limitation on only those claims brought under (b)(1) and (2).

> *of assessments of railroad property by 48 counties and cities in California.* In the State of New Jersey, the testimony indicated that at the time of the hearing there were still pending 167 railroad appeals covering the years 1953-65 which had not reached the trial calendar of the State division of tax appeals...[A railroad executive] explained that the hope of obtaining relief from the State assessing body is often defeated by a sketchy record before that agency...*[I]n many States, the railroads are not able to bring suit against the assessing body, but must instead sue the tax-collecting body, such as a county. This means that a suit must be brought in every county of the State in which the railroad has property, a time-consuming procedure quite the opposite of a plain, speedy, and efficient remedy.*

S. REP. 90-1483, at 6 (1968) (emphasis added).

These concerns supporting federal court jurisdiction were voiced in a bill addressed solely to state property taxation, were supported by testimony focused solely on state property tax cases, and highlighted administrative processes uniquely common to state property taxation, specifically, that valuations may be determined at the state-wide level while assessments may be made and must be protested at the local level. By comparison, there is generally no such procedural burden with respect to state sales and use taxes. In virtually every state, sales and use taxes may be centrally protested at the state level, and there is no equivalent to property tax

valuation or equalization processes at either the state or local levels.[13]

There is no indication that Congress ever considered extending federal jurisdiction to every other state tax type that might come under §11501(b)(4), which is exactly what would be achieved if §11501(c) were applied to subsection (b)(4) violations encompassing "another tax that discriminates." Eight years after the Senate issued S. REP. 90-1483, and shortly after (b)(4) first appeared in an introduced bill,[14] the Senate issued S. REP. 94-595, (1976) (Conf. Rep.) on S. 2718, which was ultimately enacted. This Senate Report states that subsection (c) grants jurisdiction to the federal courts, concurrent with state court jurisdiction, to remedy "any acts in violation of this section [(b)]," but "*in order for relief to be granted under the section, the transportation property must be assessed* ..." (emphasis added). S. REP. No. 94-595, at 31 (1976) (Conf. Rep.). From this history it is clear that Congress never intended or even considered broadening §11501(c) to include violations arising under §11501(b)(4).

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[13] Virtually every state requires or allows the aggrieved taxpayer to file its sales or use tax protest or appeal with the state revenue agency. CCH, Sales and Use Tax Guide, ¶61 620. *See, e.g.*, Arizona, A.R.S. 42 1108; Louisiana, L.S.A.-R.S. 47 1576; Missouri, V.A.M.S. 144-700; South Dakota, S.D.C.L. §10 59 9; New Mexico, N.M.S.A. §7-1-24. Alabama is an unusual exception in allowing local election to administer. *See*, Ala. Code 1975 §11-3-11.

[14] H.R. 5385, 93rd Cong. §201 (1974).

### B. Contrary to Two Circuit Court Opinions, it is Not "Absurd" to Exclude Claims Brought Under §11501(b)(4) from the Reach of §11501(c)

Federal circuit courts have considered whether it would be inconsistent to give the §11501(c) limitation its plain meaning in light of the sentence that precedes it, which grants federal jurisdiction "to prevent a violation of subsection (b)."

In *Trailer Train Company* v. *State Board of Equalization*, 697 F.2d 860 (9th Cir. 1983), the court addressed this question with respect to subsection §11501(b)(3). The court reviewed the purpose of the Act, "to eliminate...the burden on interstate commerce resulting from discriminatory State and local taxation of [rail carrier] property," 697 F.3d 860, 865, and that Congress recognized discrimination could come in the form of assessments or tax rates. Congress, it said, believed that a federal remedy was called for because the state court remedies were not plain, speedy, and efficient. The court then noted that on first reading, §11501(c) appears to encompass tax rate discrimination, but relief can be had only if it is accompanied by an assessment ratio discrimination of at least five percent. The court said that a statute "should not be interpreted so narrowly as to defeat its obvious intent." *Id.* Given the congressional concerns regarding state discrimination against rail carriers, the court refused to give the subsection (c) limitation its plain meaning, inaccurately concluding that to do so would lead to an "absurd" result.

In *Kansas City Southern Railway Co.* v. *McNamara*, 817 F.2d 368, (5th Cir. 1987) the circuit court had an opportunity to consider federal court jurisdiction over a claim arising under §11501(b)(4). The court noted that subsection (c) appeared limited to assessment discrimination. It then examined the Ninth Circuit court's decision (above) and incorrectly concluded that Congress had made a "mistake" in drafting subsection (c). What Congress meant to say was "[r]elief *from discriminatory assessment* [may be granted under this subsection..."]. 817 F.2d 368, 371 (emphasis in original) instead of "relief may be granted under this subsection ..." The Fifth Circuit believed that this Court had "tacitly" affirmed this reading of the statute because it made no mention of this issue when deciding that federal courts must determine whether a state taxing authority has correctly determined fair market value,[15] even though "the relief requested did not come within the literal meaning of the exception in [§11501(c)]." *Id.* It also pointed out that the Eleventh Circuit in *Alabama Great Southern Railroad* v. *Eagerton*, 663 F.2d 1036 (11th Cir. 1981), assumed jurisdiction over a non-property §11501(b)(4) matter without reaching the jurisdictional issue. The Fifth Circuit mistakenly concluded that to read the statute otherwise would lead to "absurd results," and thus §11501(c) must not be read to say "exactly what it means." *Id.*

But the intended limitation of §11501(c) is not at all "absurd." It is not even uncommon. What

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[15] *Burlington Northern Railroad Co.* v. *Oklahoma Tax Commission*, 481 U.S. 454 (1987).

Congress did was to simply grant a federal right without a federal remedy for claims brought under §11501(b)(4). It is not unusual for Congress to grant a federal right but leave the remedy for alleged violations of those rights to state courts. 49 U.S.C. §40116, regarding the state taxation of air carriers, contains language similar to that in the 4-R Act with respect to prohibiting burdensome or discriminatory state taxes. Yet, Congress did not grant federal court jurisdiction over alleged violations of its provisions. The legislative history for that Act is devoid of discussion on the whether access to federal courts should be granted. S. REP. 97-494(II) (1982), H. R. REP. 97-760 (1982) (Conf. Rep). Air carriers alleging violations of §40116 must bring action in state court for redress. *See, Western Air Lines* v. *Hughes County*, 372 N.W.2d 106 (S. Dak. 1985), *aff'd Western Air Lines* v. *Board of Equalization of State of S.D.*, 480 U.S. 123 (1987) (flight property "in lieu" tax).

Another example of Congress granting a federal right without a federal remedy is 15 U.S.C. §381 (commonly referred to as P.L. 86-272). This law prohibits a state from taxing income earned within its borders by an out of state business whose only contact with the state is through the solicitation of orders which are approved and shipped from outside the taxing state. Yet there is no grant of federal jurisdiction for claims of alleged violations of the statutory terms. Nor is there anything in the legislative history that mentions possible access to federal courts. S. REP. 86-658, (1959) Conf. Rep. 86-1103, (1959). Taxpayers alleging violations of §381 must proceed in state court. *See, William Wrigley,*

*Jr. Co.* v. *Wisconsin Department of Revenue*, 465 N.W. 2d 800 (Wis. 1991), (taxpayer's activities in state were "solicitation of orders"; state franchise tax did not apply) *rev'd* 505 U.S. 214 (1992).

A third example is 15 U.S.C. §391, which prohibits states from assessing or taxing the generation or transmission of electricity that discriminates against "out-of-State manufacturers, producers, wholesalers, retailers or consumers of that electricity." Again, the statute does not allow a cause of action for alleged violations of this section to be brought in federal court. The legislative history does not show that taxpayer access to federal courts was contemplated. S. REP. 94-938, pt. 1, (1976) H. R. REP. 94-658 (1976), H. R. REP. 94-1515 (1976) (Conf. Rep.) Again, taxpayers alleging violations of §391 must bring the claim in state court. *See, Pacific Power & Light* v. *Montana Department of Revenue*, 773 P.2d 1176 (Mont. 1989) (use tax on power lines).

These few examples, among many, sufficiently illustrate that it is not unusual for Congress to prohibit the states' ability to levy "burdensome or discriminatory" taxes pursuant to its commerce clause authority and yet not abrogate the TIA. The language of §11501(c) contains an explicit limitation that would exclude claims brought under §11501(b)(4) from federal court jurisdiction and that limitation should not be read out of the statute. Nor should words be read into the statute to create a broad exemption when the plain language supports only a narrow one. *Burlington Northern Railroad Co.* v. *Oklahoma Tax Commission*, 481 U.S. 454 (1987)

(declining to read an "intent" limitation into the statute).

Legislative history suggests, far from being an oversight, the plain language provides a meaningful response to the specific concerns that were raised. Congress was focused on state procedural obstacles to protesting discriminatory property tax assessments. The plain meaning is clear, and it is reasonable in view of the legislative history. It should not be assumed that because subsection (b)(4) was added later, Congress made a mistake which it would have corrected by expanding subsection (c) to cover the subsection (b)(4) addition. Rather, if any assumption needs to be made, it should be the opposite — given the legislative history expressing the property tax specific concerns that led to subsection (c), if a clarification were needed in light of the subsection (b)(4) addition, Congress would have clarified that subsection (b)(4) is *not* covered under subsection (c).

### C. If the Plain Language and Legislative History Leave Any Uncertainty, Principles of Federalism Compel Narrower, Rather than Broader, Federal Court Jurisdiction.

The 4-R Act's plain language and legislative history convey Congress's intent to provide a narrow, limited exception to the TIA. But to the extent any question remains whether the scope of §11501(c) should be interpreted as a narrow or broad grant of federal jurisdiction, principles of federalism compel that it be interpreted narrowly. "[I]f Congress

intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear," *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985), ("Congress should make its intentions 'clear and manifest' if it intends to preempt the historic powers of the States, *Rice* v. *Sante Fe Elevator Corp.,* 331 U.S. 218, 230 (1947), *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991).

In instances where congressional legislation intrudes on the states' traditional powers, courts "should be hesitant to extend the statute beyond its evident scope," *ACF Industries Inc.,* at 345. "This presumption against preemption leads ... to the principle that express preemption statutory provisions should be given a narrow interpretation," *Gordon* v. *Virtumundo, Inc.* 575 F.3d 1040, 1060 (9th Cir. 2009), (quoting *Air Conditioning and Refrigeration Inst.* v. *Energy Resource Commission and Development Commission,* 410 F.3d 492, 496 (9th Circuit 2005)). *See, also Cipillone* v. *Liggett Group Inc.,* 505 U.S. 504, (1992), *Maryland* v. *Louisiana,* 451 U.S. 735 (1981), and "[t]he jurisdiction of the federal courts is carefully guarded against by judicial expansion[.] *American Fire and Casualty Co.,* v. *Finn,* 341 U.S. 6, 17-18 (1951).

Allowing federal courts authority to enjoin state taxes of subsection §11501(b)(4) violations would significantly expand federal court jurisdiction from review of specific and limited challenges regarding a single state tax type – property taxes – to review of any state tax that is "another tax that

discriminates." Such an expansion should not be read into the statute when it is not supported in the legislative record by any of the evidence that formed the basis for Congressional adoption of subsection (c). The narrow interpretation, which would not expand federal jurisdiction to claims brought under subsection (b)(4), produces a reasonable result, is supported by legislative history, and is consistent with the plain meaning of the statute. There is no justification for broadly interpreting the 4-R Act to vastly expand the limited conditions under which Congress did provide for federal jurisdiction.

Subject matter jurisdiction should not be presumed, particularly where it has been questioned by two circuit courts. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998); *Trailer Train, Kansas City Southern Railway*. It should be resolved. The party asserting jurisdiction has the burden to prove its existence, *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936), and any doubts should be resolved against it. *Turner* v. *Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799).

## II. State Sales and Use Tax Exemptions Are Not Subject to Challenge Under §11501(b)(4).

In this case, the Court does *not* ask whether the State of Alabama's sales and use tax exemptions "discriminate" against rail carriers for purposes of §11501(b)(4). Rather, the Court has limited the question to whether the state's exemptions are

subject to challenge at all under §11501(b)(4). The answer is that they are not.

### A. Exemptions are Not Included Among Prohibited Acts That "Discriminate" for Evaluating Property Taxes Under (b)(1)-(3) And, Thus, Should Not be Included Among Prohibited Acts That "Discriminate" for Evaluating "Another Tax" Under (b)(4).

In sections §11501(b)(1)-(3), Congress exercised its authority under the commerce clause to prohibit specific state property tax acts that it found — after 15 years of study — "unreasonably burden and discriminate against interstate commerce." This Court has found that the language and legislative history of §11501(b)(1)-(3) do not include property tax exemptions in the measure of discrimination. *ACF Industries, Inc.* at 342. The question in this case is how broadly to interpret the term "discriminate" in the section that follows, §11501(b)(4), which prohibits states from imposing "*another* tax that discriminates."

The term "discriminates" applicable to "another tax" in subsection (b)(4) must be interpreted in the context of §11501 as a whole. The term should not be treated as completely undefined and unmoored from the rest of the section. Rather, prohibited acts that "discriminate" for purposes of "another tax" in (b)(4) can be no more inclusive than the types of acts that "discriminate" for purposes of state property taxes in §11501(b)(1) (3). "Given the normal rule of statutory construction ... identical words used in different

parts of the same act are intended to have the same meaning." *ACF Industries, Inc.* at 342 (internal quotes and citations omitted).

Congress specifically defined "commercial and industrial property" to which railroad property would be compared for purposes of §11501(b)(1)-(3) as only that commercial and industrial property "subject to a property tax levy." §11501(a)(4). And this Court has held that, by including only the property "subject to a property tax levy," Congress excluded property tax exemptions from the measure of discrimination under (b)(1)-(3). *ACF Industries, Inc.* at 342. There is no basis for re-defining the term "discriminate" more broadly to include other types of tax exemptions for purposes of evaluating "another tax" under (b)(4).

### B. To Include Exemptions Among Prohibited Acts That "Discriminate" for §11501(b)(4) Would be Contrary to Both Federal and State Legislative Purposes.

Including tax exemptions in the evaluation of discrimination for purposes of §11501(b)(4) would not only conflict with the tailored definition of prohibited "discriminat[ion]" that Congress enacted in subsections (b)(1)-(3), but also with Congress's express legislative objectives. The early legislative history of the 4-R Act explains why Congress ultimately excluded property tax exemptions from the measure of discrimination — it did not wish to grant rail carriers a preferred status over other taxpayers. ("the measure grants no favored status to transportation property nor any windfall to

carriers"), S. REP. 92-1085, at 7 (1972). Rather, Congress simply put a stop to state tax discrimination against rail carrier property ("the purpose of S. 2289 is to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of...transportation property"), S. REP. 91-630, at 1 (1969). The object is to obtain for rail carriers *equivalent* treatment with other taxpayers generally, not to obtain for rail carriers the *most preferential* tax treatment available:

> The test of discrimination as applied to assessments is to show the taxes which are based upon an assessment of the carrier's property at a higher proportion of its true market value than the proportion at which other taxpayers are assessed up their property in the same taxing district. In making this comparison, the bill contemplates the relationship between a common carrier's property and that of the "average" taxpayer in the taxing district. However, the word "average" has a precise arithmetical connotation which makes it unsuitable in this context.
>
> For simplicity, therefore, the phrase "all other property in the taxing district" has been used as the equivalent of the property of the "average" taxpayer there. Thus the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property. *The reason is obvious since, if the latter were the*

> *case, the carrier would be entitled to look for the particular parcel of property in the taxing district which was assessed lowest of all ... and demand similar treatment. This is not the purpose of the legislation, for such an interpretation would merely remove discrimination against common carriers and substitute discrimination in their favor.*

*Discriminatory Taxation of Common Carriers: Hearings on S. 927, before the Subcomm. On Surface Transportation of the Committee on Commerce*, 90th Cong. 29-30 (1967) (statement of Hon. Warren G. Magnuson, Chairman) (emphasis added).

Ultimately, this legislative objective was reflected in the final Act, through the definition of "commercial and industrial property," which includes only property that is "subject to a property tax levy." Congress did not intend to turn around and include sales or use tax exemptions within the scope of "another tax" that "discriminates" for purposes of §11501(b)(4).

The rationale for excluding property tax exemptions applies with equal force to sales and use tax exemptions. States have many exemptions that serve many different legislative policy goals, such as to promote economic development or to alleviate administrative or other burdens for particular taxpayers.[16] For example, of the states in the

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[16] This Court has upheld state authority to effectuate tax policy through exemptions and classifications as non-discriminatory. "[I]n structuring internal taxation schemes 'the States have

Eleventh circuit, Florida has 179 different sales tax exemptions, Georgia has 108, and Alabama has 45. Entitling a railroad to claim each of these state sales or use tax exemptions whenever a competitor (or any other sales or use taxpayer) is entitled to an exemption, and regardless of whether the railroad meets the statutory requirements for the exemption, would go far beyond placing rail carrier on equal footing with other taxpayers. Contrary to state legislative intent, it would entitle a railroad to possibly hundreds of state tax exemptions, even when doing so furthers no legislative policy purpose. And, contrary to Congress's legislative intent, it would essentially grant railroads most favored taxpayer status with respect to every state tax covered under §11501(b)(4).

The state sales and use tax exemptions at issue in this case provide a good example. These exemptions are common among the states.[17] The exemptions

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large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams* v. *Vermont*, 422 U.S. 14 at 22, (1985) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359). *See Nordlinger* v. *Hahn*, 505 U.S.1 (1992), *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and making distinctions in tax statutes.")

[17] Motor fuels are exempt from sales tax in forty-three States, Br. for Resp. at 13 (quoting John F. Due & John L. Mikesell, Sales Taxation: State and Local Structure and Administration (1983). In many states, these exemptions pre-date the 4-R Act, *e.g.*: Arkansas, A.C.A. §25-55-208 (1941); Connecticut, C.G.S. §12-412(15) (1947); Kentucky, KRS §139.470(19) (1960); Massachusetts, G.L. c. 64H §6(g) (1967); Minnesota, Minn. Stat. §279A.68 19(1) (1967); Nebraska, Neb. Rev. Stat. §77-2704.05

reflect the important tax policy goal of preventing the sale of motor fuels purchased for highway use from being subject to more than one transactional tax: sales/use tax and motor fuel tax. Railroad purchases of motor fuel for use in train engines are not subject to the motor fuel tax. Therefore, the state tax policy rationale for exempting these particular railroad purchases of motor fuel from the sales or use tax — avoiding "duplicative" transaction taxes — simply does not apply to the railroad purchases. Allowing railroads to claim the exemption would serve no state legislative purpose and, contrary to the federal legislative purposes, would put railroads at a distinct advantage over motor carriers that are required to pay the motor fuel tax on most of their purchases.

### C. This Court Should Not Rebalance Federal Legislative Policy Goals to Include Exemptions Among Prohibited Acts That "Discriminate" Under §11501(b)(4).

CSXT and its *Amici* have argued that excluding exemptions from evaluation under §11501(b)(4) could allow states to discriminate by "targeting" an

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(1967); Nevada, NRS §372.275 (1955); New Mexico, NMSA 1978 7-9-26 (1969); Pennsylvania, 72 P.S. §7204(11) (1953); South Dakota, SDCL §10-45-11 (1939); Utah, UCA §59-12-104(1) (1933); Wisconsin, Wis. Stats. §77.54(5)(b) (1969). *See, also*, e.g., Arizona, A.R.S. §28-5606; District of Columbia, DC ST §47-2301; Delaware, 30 Del C. §5110; Florida, FSA §206.41; Iowa, I.C.A. §452A.3; Idaho, I.C. §63-2402; Illinois, 35 ILCS 505/17; Kentucky, K.R.S. §138.220; Louisiana, L.S.A.-R.S. 47:802; Maine, 36 M.S.R.A. §2903.

exemption to all competitors (or all taxpayers) other than railroads. But this potential was a consideration for Congress to balance with other policy considerations as it drafted the Act.[18] And, as we've shown above, Congress did consider the policy implications and ultimately chose to exclude exemptions.[19]

Congress's exclusion of sales and use tax exemptions from the measure of discrimination under (b)(4) does not open the door to the discrimination it sought to prohibit any more than excluding property tax exemptions from evaluation under (b)(1)-(3) does. And by passing the 4-R Act, Congress did not remove railroads from remaining constitutional protections (*e.g.*, the equal protection clause, U.S. CONST. amend. XIV §1) or from protection through further exercise of its affirmative commerce clause authority.

Congress made a balanced policy choice to exclude exemptions and this choice should not be disturbed. We believe the Court's statement in *Burlington Northern. Railroad Co.* v. *Oklahoma Tax Comm'n.*, 481 U.S. 454, 464 (1987), is equally applicable to this case: "These are policy

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[18] We agree with the State of Alabama's analysis that the potential for this type of discrimination is limited to situations not present in this case and that can be addressed without overriding Congressional intent. Brief of Respondent, p. 56. *See*, *ACF Industries*, 510 U.S. at 346-47.

[19] Congress's balance of policy considerations came out differently with respect to property tax classifications, as opposed to exemptions. Cong. Rec. H41401 (daily ed. Dec. 17, 1975).

considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now."

### D. Giving Full Recognition to Congress's Policy Choice Regarding Exemptions for §11501 Will Have Little, If Any, Implications for Other Federal Acts That Preempt State Taxation.

Contrary to concerns expressed by Petitioner's *amici*,[20] should the court decide to read subsection (b)(4) narrowly, the decision would have little or no impact on other federal laws governing state taxation. The provisions of 49 U.S.C. 14502 (motor carriers, water carriers) and 49 U.S.C. 40016(d) (air carriers), for example, are almost identical to §11501 in that they list acts that "unreasonably burden and discriminate against interstate commerce." Those acts listed are specific and include overvaluing air and motor carrier property, levying or collecting tax on those overvaluations, and collecting ad valorem taxes at higher rates than those on other commercial and industrial property. They do not, however, include any counterpart to §11501(b)(4) in the list.[21]

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[20] Brief of *Amicus Curiae* Council on State Taxation, pp. 6-12

[21] 49 U.S.C. 40116(b) contains a provision prohibiting states from imposing a tax, fee or charge exclusively on businesses located on, or operating as a permittee at a commercial airport "other than a tax, fee or charge wholly utilized for airport or aeronautical purposes."

Another federal preemption statute, The Internet Tax Freedom Act, 47 U.S.C. §151 (Note), contains specific descriptions of what constitutes a "discriminatory tax." For example, one definition of a discriminatory tax is a tax that is "not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means."[22] The interpretation of "discriminate" for purposes of §11501(b)(4) will not directly impact the specific definition of discrimination in the Internet Tax Freedom Act.

The provisions of 15 U.S.C. §391, concerning the generation and transmission of electricity, prohibit states from discriminating against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. A tax is discriminatory if it "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." Again, because this Act contains its own, more specific definition of the measure of discrimination, it should not be directly affected by the interpretation of "discriminate" for purposes of §11501(b).

Those federal laws that completely preempt state taxation would not be affected at all, because the subject is entirely shielded from the targeted tax. For

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[22] 47 U.S.C. 151 (note, §1105).

example, 43 U.S.C. 1333 (2)(A) concerning state jurisdiction over the subsoil and seabed of the continental shelf, contains a complete preemption of state taxation ("State taxation laws shall not apply to the outer continental shelf.") Other laws that contain an absolute preemption include 49 U.S.C. §40116(b) (air transportation) and 49 U.S.C. §14505 (motor carrier transportation) prohibiting states from taxing transportation charges. Income earned in a state where the only in-state activity is solicitation and any orders are shipped from out of state, 15 U.S.C. §381, prohibiting tax on certain stock transfers, 15 U.S.C. §78bb(d), local (but not state) taxation of satellite services, 47 U.S.C. §152 note, are other examples of state preemptions with their own specifically defined prohibitions.

Other laws construct a precise regulatory structure that has nothing to do with exemptions. The Mobile Telecommunications Sourcing Act, 4 U.S.C. §§116-126, is simply a sourcing rule for identifying the jurisdiction that is eligible to apply a particular tax to wireless communications.

In sum, concerns of widespread implications resulting from a narrow reading of "discriminate" for purposes of §1105(b)(4) are overstated. Reading the 4-R Act in a narrow fashion is more consistent with the purpose of the legislation and, in fact, with the targeted specificity of other pre-emptive Acts.

## CONCLUSION

Section 11501(c) of the 4-R Act does not abrogate the Tax Injunction Act, 28 U.S.C. §1341 to grant federal district court jurisdiction over alleged violations of §11501(b)(4). The plain language and legislative history suggests limit relief to discriminatory property tax assessments that exceed a certain threshold. To the extent any doubt remains, principles of federalism compel a narrow interpretation of federal court jurisdiction. If federal court jurisdiction is found, then the reasoning of the Eleventh Circuit in *Norfolk Southern* should be upheld to exclude exemptions from consideration under §11501(b)(4). This result is consistent with the plain language of the Act and its legislative history.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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No. 09-520

IN THE

# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner*,

v.

ALABAMA DEPARTMENT OF REVENUE, ET AL.,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether a State's exemption of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subjects the taxes to challenge as "another tax that discriminates against a rail carrier" under section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11501(b)(4).

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## BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.[1]

[1] The parties have consented to the filing of this brief, and such consents are on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., the Foundation seeks to make information about government finance more understandable, accessible, and relevant to the general public. Its economic and policy analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Foundation's Center for Legal Reform furthers this goal by educating the legal community about economics and principled tax policy.

This Court's decision will provide guidance on the line between states' power to shape their tax systems and the discriminatory taxation forbidden by the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501 (the "4-R Act"). Because this Court's ruling may be looked to as authority by other courts analyzing whether specific state tax practices violate the 4-R Act, and by courts determining the scope of the 4-R Act's protections, the Tax Foundation has an institutional interest in this Court's ruling.

## SUMMARY OF ARGUMENT

The 4-R Act prohibits discriminatory state tax policies, including sales and use taxes that are discriminatory because of certain exemptions. The court below incorrectly extended this Court's reasoning on property tax exemptions in *Dep't of Revenue v. ACF Industries, Inc.* to non-property tax exemptions, which if upheld would result in

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members, or its counsel made a monetary contribution to its preparation or submission.

inconsistencies and distortions to the economy and state tax systems.

The 4-R Act's structure and purpose support a reversal of the lower court's decision. A sales and use tax with exemptions given to rail carrier competitors may be "another tax that discriminates against a rail carrier" because it is a tax that may place rail carriers at a competitive disadvantage. The omission of sales and use tax exemptions from subsections (b)(1)-(3) coupled with the "catch-all" language of subsection (b)(4) suggests that discriminatory sales and use taxes are forbidden under subsection (b)(4).

If sales and use taxes that produce discriminatory effects due to the existence of certain exemptions are not prohibited, then the purpose and meaning of the 4-R Act to prevent discriminatory treatment of rail carriers is gravely undermined, because states could adapt their tax systems to achieve the same discriminatory results as pre-enactment state tax systems.

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## ARGUMENT

### I. THE STATUTE'S STRUCTURE AND LANGUAGE COMPEL THE CONCLUSION THAT IT ALLOWS LEGAL CHALLENGES TO NON-PROPERTY TAXES LIKE ALABAMA'S SALES AND USE TAX.

In 1976, Congress enacted the 4-R Act to stabilize and sustain financially-periled rail carriers. The 4-R Act aimed to bar forms of state taxation which, according to the Act, "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b).

The primary discriminatory taxes barred by the statute are *ad valorem* property tax assessments and rates; these provisions protect rail carriers from bearing disproportionately higher property tax assessments and rates than "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3). Additionally, Congress provided a separate "catch-all" provision which prevents states from imposing "another tax that discriminates against a rail carrier." 49 U.S.C. 11501(b)(4).

This Court has held that property taxes with discriminatory exemptions may not be challenged under subsection (b)(4). *See ACF Industries, Inc.*, 510 U.S. 343 (1994) ("It would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsection (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)."). The circuit courts have reached conflicting conclusions as to whether the *ACF* holding is limited to property taxes or whether it also precludes challenges to any tax that is discriminatory because of the presence of certain exemptions. *See, e.g., Union Pac. R.R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) (holding that non-property taxes may be challenged); *Norfolk Southern Ry. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1314 (11th Cir. 2008) (holding that non-property taxes may not be challenged); *Atchison, Topeka, and Santa Fe Ry. v. Arizona*, 78 F.3d 438, 443 (9th Cir. 1996) (same).

### A. While Subsections (b)(1)-(3) Specifically Address Discriminatory Rates and Assessments in Property Taxes, Subsection (b)(4) Contains No Such Limiting Language, and Must Address a Non-Property Tax that is Discriminatory on Any Basis.

Congress's decision to include certain limiting language to the provisions of subsections (b)(1)-(3) of the 4-R Act, and then exclude that same language from subsection (b)(4), indicates that Congress intended for (b)(4) to allow challenges to non-property taxes like the one at issue in this case.

Subsection (b) of the 4-R Act provides that the states and their subdivisions may not engage in the following discriminatory taxation:

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b).

Subsections (b)(1)-(3), by their plain terms, are limited to taxes on "rail transportation property," while (b)(4) contains no such limitation. That, plus the omission of the term "other commercial and industrial taxpayers" from subsection (b)(4) of the 4-R Act, supports the conclusion that sales and use tax exemptions are subject to challenge under subsection (b)(4). Subsection (b)(4) specifically prohibits "another tax that discriminates against a rail carrier," with no stated limitation on the kind of tax to be prohibited nor any requirement that the effect of the tax on a rail carrier be compared against its effect on "other commercial and industrial property." Thus, while subsections (b)(1)-(3) apply to discriminatory taxes on "property ... owned or used by a rail carrier" as defined in subsection (a)(3), as measured against treatment of other "property ... subject to a property tax levy" as defined in subsection (a)(4), those limitations are simply not applicable to subsection (b)(4) when determining the 4-R Act's application to sales and use tax exemptions.

Unless there is reason appearing on the face of a statute to conclude otherwise, the inclusion of a defined term in one section of a statute and not the other leads to the inference that the provision should not be incorporated to where it was omitted. *See, e.g.*, *Federal Trade Comm'n v. Sun Oil Co.*, 371 U.S. 505, 513-15 (1963) ("[T]here is no reason appearing on the

face of the statute to assume that Congress intended to invoke by omission in 2(b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in 2(a)."); *Union Pac. R.R. Co.*, 507 F.3d at 695 (citing *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (8th Cir. 1999) (holding that the correct comparison class is rail carrier competitors and not the omitted "other commercial and industrial taxpayers.")).

Past cases provide support for usage of the statutory omission rule to interpret the 4-R Act. In *Fedorenko v. United States*, 449 U.S. 490 (1981), this Court was asked to interpret the statutory exceptions to the Displaced Persons Act. According to the statute, people were excepted if they "(a) [h]ave assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." *Id.* at 496 n.4. This Court reasoned that the omission of the word "voluntary" from section (a) meant that a person was excepted whether his or her participation in persecution was voluntary or not. *See id.* at 512. This Court declined to incorporate the term "voluntary" from section (b) into section (a) because "Congress was perfectly capable of adopting a voluntariness limitation where it felt one was necessary." *Id.*

Likewise, here, Congress was perfectly capable of limiting the scope of the 4-R Act when it felt necessary, as was done with subsections (b)(1)-(3). While subsections (b)(1)-(3) specifically address discrimination by rate and assessment on rail transportation property as compared against the treatment of other commercial and industrial

property, subsection (b)(4) contains no such limiting language, and thus must reach a non-property tax that is discriminatory on any basis.

The Eleventh Circuit's decision that a tax may be evaluated for discriminatory effects without considering exemptions that are part of the tax is unjustifiable as a matter of economics, statutory interpretation, and sound tax policy. By effectively providing railroad competitors with a zero percent sales tax rate while railroads pay more, Alabama achieves the same discriminatory effect as a special tax on railroads. If this Court endorses the Eleventh Circuit's reasoning, rail carrier competitors, such as water and motor carriers, will have incentive to simply seek exemptions as a convenient loophole to the 4-R Act's protections, thus recreating the discriminatory tax landscape that plagued the railroad industry when the Act was passed.

The *ACF* decision comports with traditional areas of state taxing authority for real property, such as the ability to grant broad-based homestead exemptions or tax real property at different rates based on varying types of improvements. Sales tax classifications, by contrast, are routinely industry-based and have great potential to be used to achieve discriminatory results. Sales tax systems are more capable than property taxes of being used to export tax burdens to out-of-state or national enterprises. Thus, the principles of *ACF* may be limited specifically to property taxes, harmonizing with states' own constitutional requirements for uniform classifications of real property.

This Court's analysis of property taxes and exemptions in *ACF* does not carry over to sales and

use tax systems because, unlike property tax exemptions, no language in the 4-R Act suggests that Congress sought to shield states' discretion to award sales and use tax exemptions. The "catch-all" language of subsection (b)(4) and the broad purpose of the 4-R Act suggest the opposite.

### B. Subsection (b)(4) Must Apply to Non-Property Taxes, Including Those That Are Discriminatory as a Result of Exemptions, or Else It Will Have No Operative Effect.

The 4-R Act is designed to protect rail carriers from all types of discriminatory taxes, supporting the inclusion of sales and use taxes under a subsection (b)(4) challenge if they incorporate exemptions that result in discriminatory effects. *Cf. Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987) ("Congress' solution to the problem of discriminatory state taxation of railroads was embodied in [the 4-R Act]."); *Ala. Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981) (quoting *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981) ("[The 4-R Act's] purpose was to prevent tax discrimination against railroads in any form whatsoever"). To hold that subsection (b)(4) does not apply to non-property taxes made discriminatory through tax exemptions not only conflicts with this Court's precedent, but also conflicts with the plain language and purpose of the 4-R Act.

#### *1. The 4-R Act Permits Challenges to Non-Property Taxes That Are Discriminatory as a Result of Exemptions.*

The notion that an exemption to a tax must be considered separately from the tax itself is not supported by logic or this Court's precedent. Manipulation of the components of a sales and use tax — its rates, method of assessment, and exemptions — is a method by which states can produce substantially discriminatory effects of the type prohibited by the Commerce Clause. Therefore, the discriminatory nature of a tax on railroads and similarly situated carriers should be evaluated under the 4-R Act by looking at its *effects*, not its labels. *See* 49 U.S.C. § 26(c) (1976 ed.).[2] *See also CSX Transp., Inc. v. Ga. Bd. of Equalization*, 552 U.S. 9, 22 (2007) ("[W]e hold only that nothing in the statute prevents a railroad from attempting to show that the methods chosen by the State *result* in a discriminatory determination of true market value.") (emphasis added); *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959) (observing that "magic words or labels" should not "disable an otherwise constitutional levy" or validate an otherwise unconstitutionally discriminatory tax); *Atchison, Topeka, & Santa Fe Ry. v. Bair*, 338 N.W.2d 338, 347-48 (Iowa 1983) (finding a discriminatory tax when a rail carrier is placed at a competitive disadvantage), *cert. denied*, 465 U.S. 1071 (1984). Since the 4-R Act encompasses discriminatory tax impacts on interstate rail carriers, sales and use tax exemptions should be subject to challenge under the

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[2] The original language of subsection (b)(4) was "any other tax which *results* in discriminatory treatment of a common carrier by railroad subject to this chapter." 49 U.S.C. § 26c (emphasis added). The current language does not contain any substantive change. *See CSX Transp. Inc. v. Ga. Bd. Of Equalization*, 552 U.S. 9, 9 n.1 (2007).

"catch-all" subsection (b)(4) of the Act.

This Court has consistently recognized that state tax policies, including exemptions, can result in impermissible discrimination against interstate commerce by suppressing a competitive playing field for similarly situated taxpayers. *See, e.g.*, *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 593 (1997) (invalidating a discriminatory real estate tax exemption); *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994) (holding that a discriminatory tax system involving subsidies violated "principle[s] of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production" and "neutraliz[ing] advantages belonging to the place of origin") (internal citation omitted); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (invalidating a discriminatory tax system using tax exemptions). *See also Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416-17 (8th Cir. 1988) ("Tax exemptions are to be considered in determining whether there has been discriminatory treatment under [the 4-R Act]"), *cert. denied*, 490 U.S. 1066 (1989).

This Court has also used a substance-over-form inquiry when examining tax credits, deductions, exemptions, and exclusions for possible discriminatory effects among interstate competitors, looking at the actual effect of tax policies and not merely their forms or stated intentions. *See, e.g.*, *Camps Newfound*, 520 U.S. at 575 ("To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax [as a local tax] would destroy the barrier against protectionism that the Constitution provides."), *Bacchus*, 468 U.S. at 273 (invalidating a

tax exemption for having "both the purpose and effect of discriminating in favor of local products"); *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388, 406 (1984) (disallowing a tax credit because it was "discriminatory [in] economic effect"); *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) ("Under [the] general rule, we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect."). *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (noting that the Commerce Clause is informed by "structural concerns about the *effects* of state regulation on the national economy") (emphasis added).

In *Norfolk Southern*, the Eleventh Circuit held that the 4-R Act does not encompass a tax's exemptions because subsection (b)(4) speaks only of discriminatory taxes, "not discriminatory tax exemption[s]." *Norfolk Southern*, 550 F.3d at 1315. The court thus suggested that a "tax" that penalizes rail carriers falls within the scope of subsection (b)(4), while tax exemptions, deductions, and credits that provide benefits to their competitors, do not. This view conflicts with economic evidence and Supreme Court precedent finding that a tax exemption is a part and parcel of a "tax."

For example, in *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 817 (1989), this Court held that a tax exemption provided to state employees, but not federal employees, violated a general statutory prohibition against discriminatory taxation of federal employees, despite a reference in the statute to "tax exemptions." This Court reasoned that the tax exemption was a discriminatory "tax" because it

imposed "a heavier tax burden on those who deal[t] with one sovereign than those who dealt with [an]other." *Id.* at 814. *See also Bacchus*, 468 U.S. at 273 (rejecting the relevance of whether the discriminatory action is in the form of benefit or burden); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 398-99 (1983) (finding a tax exemption to violate 31 U.S.C. § 742, which only mentions taxes and not exemptions).

This Court's doctrine on state taxation and interstate commerce has consistently recognized that formalistic distinctions between taxes and tax exemptions have no place in a legal analysis of discriminatory tax burdens. Granting a tax exemption, or a zero percent rate, to one company, can produce identical outcomes as a heavier tax on its competitors. Thus, sales and use taxes that are discriminatory because of exemptions should be challengeable under subsection (b)(4).

2. *The Eleventh Circuit's Interpretation of the 4-R Act Would Render Subsection (b)(4) a Nullity.*

Because this Court has already held in *ACF* that subsections (b)(1)-(3) are the only limitations on state property taxes, the decision of the court below to immunize non-property taxes that are discriminatory as a result of exemptions from a 4-R challenge effectively reduces subsection (b)(4) to a nullity. If the lower court's decision were upheld, states could easily make an end-run around both their own principles of uniform taxation and the Commerce Clause, enacting discriminatory taxes by another means. In particular, states could convert an impermissible discriminatory tax with higher rates

on competitors into a permissible discriminatory tax with exemptions for competitors that achieve the same result, thus allowing the states to modify their tax codes to produce the same discriminatory results for rail carriers that existed prior to the enactment of the 4-R Act. Excluding tax exemptions from consideration under the 4-R Act would thus deprive the law of its operative effect.

Moreover, this Court has never held that non-property tax exemptions are precluded from challenge under the 4-R Act. In *ACF*, this Court emphasized that it was dealing with only *property* tax exemptions. *See, e.g.*, 510 U.S. at 343 ("The structure of [the 4-R Act] warrants the conclusion that subsection (b)(4) does not limit state discretion to levy a tax upon railroad *property* while exempting various classes of nonrailroad *property*.") (emphasis added). This Court also noted in *ACF* that non-property tax exemptions could lead to forbidden discriminatory effects. *See id.* ("It is true that tax exemptions as an abstract matter, could be a variant of tax discrimination."). Thus, the Eleventh Circuit's reliance on *Norfolk Southern*, which interpreted this Court's decision in *ACF* as effectively immunizing sales and use tax exemptions from challenge under the 4-R Act, was misplaced. *See Norfolk Southern*, 550 F.3d at 1312 ("Under the 4-R Act, as interpreted and applied by the Supreme Court, a state remains free to exempt certain transactions or entities from generally applicable taxes, such as the sales and use tax at issue here.").

As the *Norfolk Southern* court recognized, Congress designed subsection (b)(4) as a prophylactic "catch-all" provision to prevent states from imposing "another tax that discriminates against a rail

carrier." *Id.* at 1311 ("Similar to other jurisdictions, this circuit interprets 11501(b)(4) as a "catchall" that prevents all forms of discriminatory taxes, property or otherwise."); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir. 1991) (holding that subsection (b)(4) encompasses all types of taxes that discriminate against railroads, including non-property taxes), *cert. denied*, 502 U.S. 856 (1991); *Richmond, F. & P. R.R. v. Dep't of Taxation*, 762 F.2d 375, 379-80 (4th Cir. 1985) (finding that subsection (b)(4) was intended to prohibit all discriminatory taxes imposed on railroads); *Ala. Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981) (finding the 4-R Act to be a catchall provision to prevent discriminatory taxation of a rail carrier "by any means"). There is no language in the 4-R Act that precludes (b)(4)'s application to non-property taxes that are discriminatory as a result of exemptions. Thus, while subsections (b)(1)-(3) address *ad valorem* property tax rates and assessments, subsection (b)(4) must address a non-property tax that is discriminatory on any basis.

### C. The Title of Section 11501 Does Not Confine the Reach of Subsection (b)(4) to Property Taxes.

Although Section 11501 is captioned "Tax discrimination against rail transportation property," this fact does not confine subsection (b)(4) to property taxes. Property may be taxed in ways other than a property tax. Further, a statute's title cannot limit the text. *See Brotherhood of Railroad Trainmen v. Baltimore*, 331 U.S. 519, 528 (1947) ("[H]eadings and titles are not meant to take the place of the detailed

provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless.").

The Fifth Circuit, noting that the caption seems at odds with a statute that encompasses non-property taxes on railroads, concluded:

> Although Congress was long concerned with blatant property-tax discrimination by many states, it realized near the end that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation. Congress therefore added [subsection] (b)(4) to ensure that the statute would not fail of its broader purpose.[...]
>
> Congress was most concerned with property tax discrimination, and it voiced that concern in detail in [subsection] (b)(1)-(3); but it included [subsection] (b)(4) to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections of [section] (b).

*Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 373-74 (5th Cir. 1987). *See also Alabama Great Southern*, 663 F.2d at 1039 ("First, the title of subsection 306, 'Tax discrimination against rail transportation property,' should not be relied upon to

determine the scope of subsection 306(1)(d)."); *Bair*, 338 N.W.2d at 344 (Iowa 1983) ("The title of a statute or heading of a section cannot limit the plain meaning of the text. We are unable to read Congress' words "any other tax" to mean 'any other property tax'.").

Thus, the statute's title referencing "property" taxes does not relegate the application of subsection (b)(4) only to property taxes.

## II. THE CONSEQUENCES RESULTING FROM PREVENTING CHALLENGES TO STATES' DISCRIMINATORY NON-PROPERTY TAXES ARE IDENTICAL TO THOSE CONGRESS AIMED TO PREVENT IN CREATING THE 4-R ACT.

The problems created by discriminatory state property taxes are no different from those created by discriminatory non-property taxes — namely that rail carriers will be forced to pay more than their non-rail competitors, thus putting them at a comparative disadvantage. Moreover, states have incentives to discriminate against interstate rail carriers and favor intrastate competitors. If this Court declines to allow challenges under subsection (b)(4) of the 4-R Act to non-property taxes that have become discriminatory through exemptions, states will once again target rail carriers for the kinds of tax discrimination the 4-R Act was meant to prevent.

Prior to the 4-R Act's passage, Congress noted how there was "widespread, long-standing and deliberate" tax discrimination against rail carriers by the states. *Union Pac. R.R. v. Utah*, 198 F.3d 1201, 1206 (10th Cir. 1999). States were even ignoring

their own constitutional uniformity requirements in doing this. *See id.* The result was that interstate rail carriers were subject to over $900 million in discriminatory taxation over a period of nine years. *Id.*, *citing* S. Rep. No. 91-630, at 3 (1969).

Congress also took note that "State procedures to challenge discriminatory State tax assessments are often difficult, time consuming, and not productive of material relief. For example, the Southern Pacific and its rail affiliates were required to bring 48 separate suits in 48 separate California superior courts to challenge the level of assessments of railroad property by 48 counties and cities in California." *Id.* at 1207, *citing* S. Rep. No. 91-630 at 6-7.

The incentives that lead states to favor local carriers over interstate carriers, namely the promotion of the local economy over the health of the nation's economy, have not changed since the 4-R Act was passed. Nor has the difficulty for an interstate rail carrier to defend itself against a plethora of discriminatory taxes that not only vary from state to state, but by county, city, or township. The essence of the 4-R Act was to provide an efficient means for rail carriers to defend themselves against discriminatory state taxation, whether through property or non-property taxes. The Eleventh Circuit's decision heralds a return to widespread tax discrimination against interstate rail carriers that the 4-R Act was crafted to prevent, and will force those companies back into a multitude of lawsuits at the state level to protect themselves. It could not have been Congress's intention to allow that.

## CONCLUSION

The lower court's unwarranted expansion of this Court's decision in *ACF* creates artificial constraints on the scope of the 4-R Act's enacting purpose of prohibiting taxes that discriminate against rail carriers. That the 4-R Act does not explicitly refer to sales and use tax exemptions as a type of discriminatory tax policy subject to challenge does not indicate that such policies were meant to be immunized. Rather, a tax can be discriminatory because of the presence of certain exemptions, and such a tax can fall within the scope of the "catch-all" subsection (b)(4).

This Court has long understood that the touchstone of discriminatory taxes is their economic effects. No economic distinction can be made between the burdens imposed by a higher rate on one party relative to his competitors, and the burdens imposed by a rate of zero on competitors while the party pays the tax. Taxpayers should have standing under subsection (b)(4) to challenge such exemptions for their possibly discriminatory impact on similarly situated competitors in the rail transportation industry.

To maintain the careful balance of states' taxing power against businesses' right to compete fairly in the national market, this Court should reverse the decision of the lower court and specify that sales and use taxes, including their exemptions, are not immunized from challenge under subsection (b)(4).

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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# IN THE SUPREME COURT OF THE UNITED STATES

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## AMICUS BRIEF FOR THE STATES OF WASHINGTON, DELAWARE, GEORGIA, INDIANA, IOWA, MARYLAND, MICHIGAN, MINNESOTA, MONTANA, NEVADA, OHIO, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as "another tax that discriminates against a rail carrier."

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## INTEREST OF AMICI CURIAE

This case concerns the interpretation of 49 U.S.C. § 11501.[1] Subsections (1)-(3) prohibit certain acts related to the imposition of ad valorem property taxes on rail carriers. Subsection (b)(4) prohibits imposing "another tax that discriminates against a rail carrier[.]" The issue before this Court is whether a State's exemption of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes constitutes another tax that discriminates against a rail carrier in violation of subsection (b)(4).

The Amici States have a vital interest in this question. Rail carriers carry on extensive operations within the boundaries of the States that represent a significant presence in terms of personnel and property, and a concomitant obligation on the part of State and local governments to provide essential services. Sales and use taxes are an important part of the revenue systems of most States. Like Alabama, the States have traditionally provided exemptions from their sales and use tax systems that serve important policy objectives, such as encouraging economic development, some of which benefit rail carriers as well as other businesses. Other exemptions are available to rail carriers, but

[1] 49 U.S.C. § 11501 is the current codification of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 54. This brief refers to the current codification. *See* Sup. Ct. R. 34.5.

do not apply directly to the conduct of rail transportation.[2]

If the decision below is reversed, and rail carriers may challenge any State or local tax under subsection (b)(4) other than a generally applicable ad valorem property tax, rail carriers effectively would be immunized from most (if not all) State and local taxes under subsection (b)(4), as it is interpreted by CSX Transportation, Inc. (CSX), since virtually all taxes imposed by State and local governments that are paid by rail carriers contain an exemption that does not directly benefit rail carriers. Thus, rail carriers would be relieved of their obligation to pay their fair share of taxes for the many services they receive from State and local governments.[3]

A broader concern is whether Congress ever intended to restrict the States' exercise of their taxing powers to the degree urged by CSX and the United States. An accelerating trend of federal pre-emption of State regulatory and taxing powers, even as additional responsibilities are shifted from the

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[2] For example, Alabama's sales and use tax exemptions at issue here are available to rail carriers. Although the purchase and consumption of diesel fuel by CSX Transportation, Inc. (CSX) for rail transportation purposes may be subject to Alabama's sales and use taxes, CSX enjoys the benefit of the exemptions with respect to its purchase and consumption of diesel fuel or other motor vehicle fuel for vehicles that it uses on Alabama's highways.

[3] CSX essentially seeks "most-favored-taxpayer" status under § 11501 "when it comes to *non-property* taxes because they are entitled to every tax benefit given another carrier." *See* Br. Resp'ts at 23 (CSX's emphasis).

National Government, has long been documented.[4] In this current climate, the States should not be made to suffer the consequences of a sweeping prohibition on the use of their taxing powers, otherwise sovereign, based on statutory language that is inherently vague. Rather, this Court should require Congress to speak with considerably more clarity and precision if it intends to interfere with the States' fundamental power to impose taxes.

## SUMMARY OF ARGUMENT

This case turns on the meaning of 49 U.S.C. § 11501(b)(4). When § 11501 is properly read in context, the meaning of subsection (b)(4) is anything but plain on its face. By its use of the phrase "another tax that discriminates against a rail carrier" in subsection (b)(4), Congress undoubtedly intended some reference to subsections (b)(1)-(3). In those subsections, Congress defined discrimination as imposing higher assessment ratios and tax rates upon rail transportation property than upon other commercial and industrial property. The logical inference is that Congress intended subsection (b)(4) to prohibit like discrimination, not every other conceivable form of alleged discrimination. This is confirmed by subsection (c), which specifically limits the relief that may be granted under § 11501 to taxes on rail transportation property and taxes that can be viewed as equivalent to taxes on rail transportation property. Congress, therefore, did not intend

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[4] *See generally* U.S. Advisory Comm'n on Intergovernmental Relations, *Federal Statutory Pre-emption of State and Local Authority: History, Inventory, and Issues* (1992).

through subsection (b)(4) to address sales and use taxes.

Nothing in the legislative history suggests that subsection (b)(4) was intended to have the sweeping pre-emptive effects that CSX seeks in this case. Instead, the history shows that Congress intended subsection (b)(4) to apply only to taxes that are imposed in lieu of property taxes. Every explanatory reference to the prohibition in subsection (b)(4) refers to "in lieu taxes." And no reference or discussion in the legislative history indicates that subsection (b)(4) was ever intended to address sales and use taxes at all.

The expansive interpretations of subsection (b)(4) offered by CSX and the United States are incompatible with the *only* relief that is available under subsection (c). Reading § 11501 as a whole, the only reasonable conclusion is that Congress intended the relief that is available under subsection (c) to be coextensive with the discrimination that is prohibited under subsection (b), including subsection (b)(4). Congress, therefore, did not intend subsection (b)(4) to apply to sales and use taxes.

Section 11501 pre-empts the taxing powers of the States. Therefore, this Court should be hesitant to extend the statute beyond its evident scope. If Congress had intended to prohibit allegedly discriminatory sales and use taxes through subsection (b)(4), it would have spoken with clarity and set forth an explicit prohibition like those contained in subsections (b)(1)-(3) pertaining to discriminatory tax rates and assessment ratios. This Court should decline to adopt—as CSX and the

United States urge--a virtually unlimited interpretation of subsection (b)(4) that would significantly interfere with the States' taxing powers, particularly where such a broad interpretation is unsupported by any clear language in § 11501.

## ARGUMENT

### 1. Subsection (b)(4) Of The 4-R Act, Which Prohibits As Discriminatory "Another Tax That Discriminates Against A Rail Carrier," Is Inherently Ambiguous

Subsection (b) of § 11501 lists the State taxing practices that Congress has prohibited because they "unreasonably burden and discriminate against interstate commerce." Subsections (b)(1)-(3) prohibit certain acts related to the imposition of ad valorem property taxes on rail carriers. Subsection (b)(1) addresses property tax assessments; subsection (b)(2) addresses the levy and collection of property taxes; and subsection (b)(3) addresses property tax rates.[5]

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[5] Subsections (b)(1)-(3) provide:

> "The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
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> "(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

The comparison classes of "rail transportation property" and "commercial and industrial property" apply with respect to each of these subsections.[6]

In contrast to subsections (b)(1)-(3), which proscribe specific State acts, subsection (b)(4) employs imprecise language that prohibits the imposition of "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). Fixating on the words "another tax" and "any other tax," CSX contends that the meaning of subsection (b)(4) is "plain." *See* Br. Pet'r at 14-18. According to CSX, "Congress's use of the term 'another tax' compels the conclusion that subsection (b)(4) permits challenges to *all* tax schemes, not already governed by subsections (b)(1)-(3), that are alleged to discriminate against railroads." Br. Pet'r at 14.[7] CSX further

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"(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

"(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11501(b)(1)-(3).

[6] "Rail transportation property" is defined as "property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part." 49 U.S.C. § 11501(a)(3).

"Commercial and industrial property" is defined as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 11501(a)(4).

[7] *See also* Br. United States as Amicus Curiae Supporting Pet'r (U.S. Amicus Br.) at 12 ("the word 'any' has an

argues that "[n]othing in subsection (b)(4) precludes its application to generally applicable non-property taxes challenged on the ground that railroad competitors have been granted exemptions." Br. Pet'r at 14.

CSX's simplistic "plain meaning" argument misses the mark. First, it improperly reads "another tax" in isolation, not in light of § 11501 as a whole. In myopically focusing on two words in the statute, CSX forgets that courts must not "be guided by a single sentence or member of a sentence," but must "look to the provisions of the whole law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992). As this Court recognized in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994), such a reading of subsection (b)(4), "while plausible when viewed in isolation . . . is untenable in light of § [11501] as a whole." When § 11501 is read as a whole, CSX's argument, which relies entirely on two words from subsection (b)(4), is unreasonable.

Second, contrary to CSX's argument, the meaning of subsection (b)(4) is anything but plain. Congress surely could not have been less clear than to have prohibited as discriminatory "another tax that discriminates against a rail carrier." Indeed, this Court, in *ACF Industries*, commented that the scope of subsection (b)(4) is "not as clear" as the scope of subsections (b)(1)-(3). *ACF Indus.*, 510 U.S. at 337. And regarding the question of tax

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expansive meaning"). *But see Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'any' can and does mean different things depending upon the setting").

exemptions, this Court stated that subsection (b)(4) "is, at best, vague on the point." *ACF Indus.*, 510 U.S. at 337. Congress did not "state whether exemptions are a form of forbidden discrimination against rail carriers" and further did not "provide a standard for courts to distinguish valid from invalid exemption schemes." *ACF Indus.*, 510 U.S. at 343.[8]

Third, Congress's use of the word "discrimmates," without additional elaboration, demonstrates that subsection (b)(4) is anything but plain on its face. The vague word "discriminates," divorced from its context, is inherently ambiguous. *See, e.g., Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 592 (1983) (opinion of White, J., announcing the judgment) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so."); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J., announcing the judgment) ("The concept of 'discrimmination' . . . is susceptible of varying interpretations, for as Mr. Justice Holmes declared, '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us.'" (citation omitted)).

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[8] *ACF Industries* resolved whether subsection (b)(4) applies to a generally applicable ad valorem property tax. *ACF Indus.*, 510 U.S. at 340-44. The Court, however, declined to determine what other taxes are covered by subsection (b)(4).

CSX contends that subsection (b)(4) "necessarily extends to suits challenging the imposition of a non-property tax on railroads that discriminates because railroad competitors are exempt from the tax." Br. Pet'r at 17. In support, CSX relies on this Court's statement in *ACF Industries* that tax exemptions "could be a variant of tax discrimination." Br. Pet'r at 17.[9] CSX also cites several additional cases to argue that "this Court has long and routinely held that imposing a tax on certain taxpayers while exempting others is a form of discrimination that can be unlawful." Br. Resp'ts at 17. In contrast, the United States acknowledges that subsection (b)(4) "does not specify the appropriate comparison class, and does not include an objective test by which to measure discrimination." U.S. Amicus Br. at 11. The United States thus urges the Court to apply the "ordinary meaning" of the word "discrimination." *See* U.S. Amicus Br. at 13.

But neither CSX nor the United States acknowledge a more plausible interpretation of what Congress meant by "another tax that discriminates against a rail carrier" in subsection (b)(4). Alabama correctly argues that subsection (b)(4) "gains it[s] meaning by reference to subsections (b)(1)-(b)(3)." Br. Resp'ts at 28, *see also ACF Indus.*, 510 U.S. at 340 ("The interplay between subsections (b)(1)-(3) and the definition of 'commercial and industrial

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[9] CSX quotes only a part of the Court's statement. The entire statement is: "It is true that tax exemptions, *as an abstract matter*, could be a variant of tax discrimination." *ACF Indus.*, 510 U.S. at 343 (emphasis added).

property' in subsection (a)(4) is central to the interpretation of subsection (b)(4).").

Through subsections (b)(1)-(3), which apply to generally applicable ad valorem property taxes, Congress forbade the imposition of higher assessment ratios and tax rates upon rail transportation property than upon other commercial and industrial property. *See ACF Indus.*, 510 U.S. at 340. Congress, however, did not forbid as discriminatory the granting of exemptions through subsections (b)(1)-(3). *See ACF Indus.*, 510 U.S. at 342 ("railroads may not challenge property tax exemptions under those provisions [referring to subsections (b)(1)-(3)]"). By its use of the phrase "another tax that discriminates against a rail carrier" in subsection (b)(4), Congress undoubtedly intended some reference to subsections (b)(1)-(3). Having defined discrimination in those subsections as applying higher assessment ratios and tax rates upon rail transportation property than upon other commercial and industrial property, the logical inference is that Congress intended subsection (b)(4) to prohibit like discrimination, not every other conceivable form of alleged discrimination. Consequently, read as a whole, § 11501 suggests that Congress did not intend through subsection (b)(4) to address sales and use taxes at all.

Fourth, at its core, CSX's argument is that a rail carrier may bring an action under subsection (b)(4) challenging any State tax, other than a generally applicable property tax, if the rail carrier merely alleges the tax is discriminatory. Also, rail carriers apparently may compare themselves to whomever they please in alleging discrimination.

CSX's infinitely broad interpretation, however, effectively converts subsection (b)(4)'s prohibition against imposing "another tax that discriminates against a rail carrier" into a prohibition against "another tax against a rail carrier." By its very nature, the selection of the comparison class is critical to determining whether discrimination exists. Consequently, this Court must do more than simply determine whether Alabama's sales and use taxes are "another tax" under subsection (b)(4).

We thus strongly disagree with the suggestion of the United States that the "precise nature and contours of the inquiry into whether a particular state tax 'discriminates against a rail carrier' in violation of Subsection (b)(4) [is] outside the scope of the question on which this Court granted a writ of certiorari." U.S. Amicus Br. at 25. To answer the question presented, the Court necessarily must determine the meaning of "another tax that discriminates against a rail carrier" under subsection (b)(4), as well as the proper comparison class under the subsection.

Finally, subsection (c) is an exception to the Tax Injunction Act, 28 U.S.C. § 1341, that generally prohibits federal district courts from enjoining, suspending, or restraining the assessment, levy, or collection of State taxes.[10] Notwithstanding the Tax Injunction Act, subsection (c) grants federal district courts jurisdiction "to prevent a violation of

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[10] 28 U.S.C. § 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

subsection (b) of this section." But Congress expressly limited the relief that is available under subsection (c): "Relief may be granted under this subsection *only if* the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." (Emphasis added.) Subsection (c) thus specifically limits the relief that may be granted under § 11501 to taxes on rail transportation property and taxes that can be viewed as equivalent to taxes on rail transportation property.[11] By limiting relief in this manner, Congress clearly could not have intended subsection (b)(4) to apply to transactional taxes such as sales and use taxes. Rather, this demonstrates that Congress intended subsection (b) to apply only to generally applicable ad valorem property taxes (through subsections (b)(1)-(3)) and another tax imposed in lieu of a generally applicable ad valorem property tax (through subsection (b)(4)).[12]

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[11] This conclusion is consistent with the definitions in § 11501, which relate solely to types of property ("rail transportation property" and "commercial and industrial property") and to terms common to ad valorem property taxes ("assessment" and "assessment jurisdiction"). *See* 49 U.S.C. § 11501(a)(1)-(4).

[12] This Court has implied that subsection (b)(4)'s application may be so limited, noting that industry representatives, "when urging the Senate to adopt subsection (b)(4) . . . characterized the provision as prohibiting only discriminatory in lieu and gross receipts taxes[.]" *ACF Indus.*, 510 U.S. at 346.

Subsection (c) also dictates the comparison class in an action under § 11501. Regardless of what taxes might be governed by subsection (b)(4), the required comparison is to "other commercial and industrial property in the same assessment jurisdiction." § 11501(c). Consequently, CSX vastly overreaches in arguing that subsection (b)(4) "necessarily extends to suits challenging the imposition of a non-property tax on railroads that discriminates because railroad competitors are exempt from the tax." Br. Pet'r at 17.

Therefore, read as a whole, § 11501 refutes CSX's "plain meaning" argument urging a virtually unlimited application of subsection (b)(4) to any and all State taxes, including exemptions from such taxes, other than generally applicable ad valorem property taxes. As subsection (c) shows, Congress could not have intended subsection (b)(4) to apply so expansively.

In sum, because the meaning of subsection (b)(4) is anything but plain, being susceptible to multiple interpretations, this Court should look to the 4-R Act's legislative history for guidance, and also should consider applicable principles of federalism when interpreting federal statutes that impinge upon the States' historic taxing powers.

### 2. The 4-R Act's Legislative History Shows That Congress Intended Subsection (b)(4) To Prohibit Only Discriminatory Gross Receipts Taxes Imposed In Lieu Of Property Taxes

In 1961, Congress began its inquiry into the matter of tax discrimination against railroads by the

States and their subdivisions. *See* S. Rep. No. 87-445 (1961). Its study of this problem eventually culminated in the enactment of the 4-R Act in February 1976. Throughout this 15-year period, Congress focused on discrimination issues in State and local ad valorem property taxation.

Section 11501 had its origins in the "Doyle Report," a national transportation policy study requested by the 86th Congress, one portion of which addressed discriminatory ad valorem property taxation of railroad land and rights-of-way. S. Rep. No. 87-445, at 445-91 (1961). The report concluded that States commonly assessed railroad property at a proportion of full value (assessment ratio) substantially higher than other property subject to the same local tax rates. The report endorsed an "antidiscrimination law" drafted by the American Association of Railroads as a solution for this problem. S. Rep. No. 87-445, at 465-66.

In 1964 and 1966, bills were introduced that were modeled closely on this antidiscrimination law. H.R. 736, 88th Cong., 2d Sess. (1964); H.R. 10169, 88th Cong., 2d Sess. (1964); H.R. 4972, 89th Cong., 2d Sess. (1966). These bills were narrow. They addressed only the assessment process and were designed to relieve railroads from only the excessive portion of the property tax.

By 1967, the railroads no longer believed that they could be protected from overtaxation of their property by prohibiting only higher assessment ratios. To address the possibility that States might evade the discriminatory assessment prohibition through the use of discriminatory property tax rates,

a new bill added a third prohibition invalidating a rate imposed on railroad property to the extent it was higher than the rates on "all other property" in a taxing district. S. 927, 90th Cong., 1st Sess. (1967); *see* S. Rep. No. 90-1483 (1968).

The provision in the 4-R Act prohibiting "any other tax which results in discriminatory treatment" surfaced inconspicuously and was present in some bills, but not others. In February 1974, two years before Congress enacted the 4-R Act, Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, introduced H.R. 12891. Section 8 of that bill would have added a new section to the Interstate Commerce Act reading, in part:

> "(2) Notwithstanding the provisions of section 202(b) of this Act, the following actions by any State, or subdivision or agency thereof, whether taken pursuant to a constitutional provision, statute, administrative order, or practice, or otherwise, constitute an unreasonable and unjust discrimination against, and an undue burden upon interstate commerce and are prohibited:
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> "...
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> "(d) the imposition of any other tax which results in discriminatory treatment of a carrier subject to part I or part III of the Interstate Commerce Act." *Hearings Before the H. Comm. on Interstate & Foreign Commerce & the Subcomm. on Transportation & Aeronautics on H.R. 12891, H.R. 5385, H.R.*

*13487, H.R. 10694, and S. 1149*, 93d Cong. 2d Sess. 3, 24 (1974) (*1974 Hearings*).

This provision in H.R. 12891 prohibiting "any other tax which results in discriminatory treatment" of interstate carriers was essentially identical to § 11501(b)(4) in its application to railroads.

There is nothing in the legislative history suggesting that this provision was intended to have the sweeping pre-emptive effects that CSX seeks in this case. Initially, the presence of the provision was not deemed by witnesses on either side of the tax discrimination issue to be worth mentioning, and railroad witnesses in particular attached no significance to it. In a written statement prepared for the House Subcommittee on Transportation and Aeronautics, the Chairman of the Interstate Commerce Commission described H.R. 5385—which contained no such provision –and H.R. 12891 as dealing with the problem of tax discrimination "in substantially the same manner." *1974 Hearings* at 347. Similarly, in a written statement prepared for the same subcommittee, the president of the Transportation Association of America described the provisions in section 8 of H.R. 12891 as "very similar to those in H.R. 5385." *1974 Hearings* at 372-73, 379. In another written statement, the general counsel of the Freight Forwarders Institute told the subcommittee that both bills "prohibit discriminatory State and local taxation of property" and expressed "no preference as between the two versions." *1974 Hearings* at 404.

Perhaps more significantly, in his written statement prepared for the same subcommittee, the

president of the Association of American Railroads explained that both section 201 of H.R. 5383 and section 8 of H.R. 12891 were "designed to prevent discriminatory state and local taxation of transportation property." *1974 Hearings* at 434. He stated that "the provisions of the two bills are substantially the same." *Id.*. Using the H.R. 12891 version "for illustration," he then listed the actions prohibited by the bills, ending with the provision absent from H.R. 5385—"the imposition of any other tax which results in discriminatory treatment of a carrier subject to Part I or Part III of the Interstate Commerce Act." *Id.* He ended his discussion of these sections of the bills by noting that "remedial legislation of this character" had been "long advocated by the carriers" and had been before Congress "for many years." *Id.* at 435.[13]

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[13] The president of the American Trucking Association similarly explained in a written statement that both section 201 of H.R. 5385 and section 8 of H.R. 12891 would prohibit States and their subdivisions "from assessing transportation property (and collecting property taxes on such assessments) higher than the ratio of assessed value to true market value of all other industrial and commercial property in the assessment jurisdiction." *1974 Hearings* at 462, 467. He objected only to the provisions in both bills allowing discriminatory assessments by as much as five percent and suggested their elimination. *Id.* at 467.

The written statement of the American Farm Bureau Federation explained that both bills prohibited "discrimination in tax policy with respect to transportation property." *Id.* at 760. But the organization expressed opposition to Congress dictating conditions under which States and their subdivisions "may administer property taxes." *Id.* at 760.

Thus, the two bills proceeded side by-side through the lengthy hearings without so much as a single reference to the difference in text or any suggestion that the provision in H.R. 12891 prohibiting "any other tax which results in discriminatory treatment" of interstate carriers was of any substantive significance. To the contrary, all the witnesses who referred to the antidiscrimination provisions in the bills described them as if they were identical in scope and effect.

In September 1974, the House Committee on Interstate and Foreign Commerce reported out H.R. 5385 in the form of a striking amendment, recommending that the bill pass as amended. H.R. Rep. No. 93-1381, at 1 (1974). With minor technical corrections, section 201 of the amended bill, prohibiting discriminatory state and local taxation, was essentially identical to the version previously before the House subcommittee, except that it now contained a new fourth prohibited action in subsection (a)(4)—"The imposition of any other tax which results in discriminatory treatment of a common or contract carrier subject to this part, part II, part III, or part IV of this Act." *See id.* at 5-6, 74-76. This new language incorporated, in slightly amended form, the provision that had first appeared in H.R. 12891.

The committee described the reported bill as banning "discriminatory taxation of transportation property" by any State or its subdivision. H.R. Rep. No. 93-1381, at 15, 25. The committee explained that eight States then had "either statutory or constitutional taxation provisions" that assessed "transportation property at a higher rate than other

industrial or commercial properties." *Id.* at 25. The committee explained that the bill would give States and their subdivisions three years "to equalize the tax structure for transportation and other commercial and industrial property." *Id.* at 26.

The committee also provided a detailed, section-by-section analysis of the reported bill. *Id.* at 33-43. In discussing section 201, the committee described the taxation actions that the bill would make unlawful. *Id.* at 35-36. These included "(4) the imposition of any other tax which discriminates against a common or contract carrier regulated by the Interstate Commerce Act (*the so-called 'in-lieu tax'*)." *Id.* at 36 (emphasis added). The committee explained that subsection (c) outlined "methods by which true market value can be established" and gave the courts "guidelines for determination of whether a tax is unlawful." *Id.* The committee further explained that subsection (d) established a new federal court remedy for interstate carriers who wished to challenge taxing authorities under section 201. However, to use this new remedy, the committee stated, "a carrier's property must be assessed at a percentage at least 5 percent above that applied to all other property in the assessment jurisdiction." *Id.*

A similar fourth prohibition did not appear in a Senate bill until June 1975. *See* S. 1876, 94th Cong., 1st Sess. (1975). And even as late as October 1975, some of the Senate's versions of the 4-R Act did not contain such a provision. *See, e.g., Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on Legislation Relating to Rail Passenger Service*, No. 94-31, 94th

Cong., 1st Sess., Part 5, at 1553 (1975) (*1975 Hearings*). Consequently, in October 1975, the president of the Association of American Railroads, in a written statement prepared for the Senate Subcommittee on Surface Transportation, urged the Senate to include such a provision to protect railroads from discriminatory taxes imposed "in lieu of" property taxes: "We suggest that the bill should be amended by adding a fourth prohibition, namely, one against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions listed above." *1975 Hearings* at 1833, 1837.

Stuart H. Johnson, Jr., on behalf of the New York Dock Railway, likewise testified in favor of such a fourth prohibition. He asserted that such a provision would protect the New York Dock Railway against "a New York City gross receipts tax applicable to public utilities." *Id.* at 1881, 1883, 1886.

The Senate apparently heeded requests to protect railroads against discriminatory taxes "in lieu" of property taxes because the final Senate bill, which soon became the 4-R Act, included the "any other tax which results in discriminatory treatment" provision. *See* S. 2718, 94th Cong., 1st Sess. (1975).

A House report in December 1975 discussed the intent of the 4-R Act. This report directly stated that the purpose of the section prohibiting certain state taxation actions was to end "discriminatory property and 'in lieu' taxation":

> "Specifically, this section amends Part I of the Interstate Commerce Act to include a

> new section which would make unlawful *certain* state taxation activities, or actions by any subdivision or agency of a state. These actions include: . . . (4) the imposition of any other tax which discriminates against a common or contract carrier regulated by the Interstate Commerce Act (the so-called "in-lieu tax").
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> "...
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> "The Committee found that railroads are overtaxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, *the Committee believes discriminatory property and "in lieu" taxation should be ended.*" H.R. Rep. No. 94-725, at 76-78 (1975) (emphasis added).[14]

The final part of the legislative record providing insight into the purpose of the "any other tax" provision is found in the report of the House-Senate Conference Committee on S. 2718. S. Rep. No. 94-595, at 165-66 (1976). That report described the purpose of that provision in H.R. 10979 as

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[14] In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 130 n.* (1987), this Court cited the same pages of the 4-R Act's legislative history in discussing the phrase "in lieu tax": "This Report used the phrase 'in lieu tax' to describe *special taxes on common carriers that operate differently from the generally applicable property tax schemes.* H.R. Report No. 94-275, pp. 77, 78 (1975)."

prohibiting "the imposition of a discriminatory 'in-lieu tax'": "Part I of the Interstate Commerce Act was amended to include a new section making unlawful ad valorem State or State subdivision taxation activities. Such prohibited tax practices included . . . (4) *the imposition of a discriminatory 'in-lieu tax'*." S. Rep. No 94-595, at 165-66 (emphasis added).

CSX mischaracterizes this legislative history. As Alabama explains, "CSX's legislative history is largely predicated on a research error." Br. Resp'ts at 53. CSX is simply wrong in claiming that the Conference Committee rejected a narrower House version in favor of the Senate version.

The 4-R Act's actual legislative history shows that Congress intended subsection (b)(4) to apply only to taxes that are imposed in lieu of property taxes. *See Burlington N. R.R. Co. v. City of Superior, Wis.*, 932 F.2d 1185, 1186 (7th Cir. 1991) (explaining that the House's "reference" to an "in-lieu tax" meant "gross receipts taxes that a few of the states impose in lieu of property taxes"). From the time it was introduced in 1974, the fourth prohibited act was repeatedly described as addressing "in lieu" taxes, that is, gross receipts taxes imposed as a substitute for property taxes for particular businesses. This Court noted this in *ACF Industries*, stating: "In fact, when urging Congress to adopt subsection (b)(4), industry representatives characterized the provision as prohibiting only discriminatory in lieu taxes and gross receipts taxes[.]" *ACF Indus.*, 510 U.S. at 346. And nothing in the legislative history indicates that subsection (b)(4) ever was intended to address sales and use taxes at all.

As rail carriers typically do in 4-R Act litigation, CSX cites various circuit court opinions to claim that subsection (b)(4) was intended to prevent discriminatory taxation against railroads "in any form whatsoever," "by any means," and "in all of its guises." Br. Pet'r at 16 (quoting, respectively, *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981); *Richmond, Fredericksburg & Potomac R.R. Co. v. Dep't of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983)). But none of these statements has any support in the language of § 11501 or its legislative history.

First, some differential treatment of railroads clearly is permissible under § 11501. Subsection (a)(4), for example, excludes non-commercial and non-industrial property, agricultural land, timber land, and property not subject to a property tax from the statutory comparison class, and thus permits States to tax such property more favorably than rail transportation property. Similarly, under subsection (c), "[r]elief may be granted . . . *only if* the ratio of assessed value to true market value of rail transportation property *exceeds by at least 5 percent* the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." (Emphasis added.) And this Court in *ACF Industries* held that subsection (b)(4) does not permit claims alleging property tax exemption discrimination. *ACF Indus.*, 510 U.S. at 343. Thus, the text of § 11501 shows that Congress did not intend subsection (b)(4) to address

"any and all forms" of alleged tax discrimination.[15] Second, the legislative history discussed in Section 2 of this brief contradicts that Congress intended subsection (b)(4) to prevent discriminatory taxation of rail carriers in "any and all forms."

CSX, thus, vastly overstates Congress's purpose of enacting subsection (b)(4). The legislative history shows that Congress considered that § 11501's impact on States would be limited to "certain abuses" practiced by some, but not all, of the States. *See* 120 Cong. Rec. 38,734 (1974) (Representative Adams explaining the purpose of H.R. 5385 (1974)). Sales and use taxes were never identified as an area of concern. Thus, nothing in the legislative history supports the notion that Congress intended subsection (b)(4) to be broadly used—as CSX argues—to strike down sales and use taxes imposed on a rail carrier merely because some other person is exempt from such taxes.

Railroads actively participated in the 15-year study by Congress of discriminatory taxation and submitted many reports on the subject during that period. Yet, nowhere in those reports or in other legislative history were sales and use taxes mentioned as part of the problem that needed to be addressed. That omission is significant because sales and use tax exemptions were prevalent

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[15] As Alabama correctly notes, it would be "bizarre" to conclude that "Congress spent 15 years refining its prohibition on discriminatory property taxes, only to draw that prohibition more narrowly than subsection (b)(4)'s prohibition on discriminatory sales and use taxes—a topic Congress never discussed when drafting the statute." Br. Resp'ts at 23-24.

throughout the period Congress studied this tax discrimination problem. Had Congress viewed the States' practice of providing sales and use tax exemptions as part of the problem, it undoubtedly would have prohibited such exemptions specifically. *Cf. ACF Indus.*, 510 U.S. at 344 ("Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, § [11501]'s silence on the subject—in light of the explicit prohibition of tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place.").

In sum, construing subsection (b)(4) to apply to sales and use taxes is at odds with every indication of Congress's intent to be found in the legislative history of the 4-R Act. Therefore, there is no warrant for concluding that sales and use tax exemptions for diesel fuel can constitute "another tax that discriminates against rail carriers."

### 3. Limiting Subsection (b)(4) To Taxes Imposed In Lieu Of Property Taxes Is Consistent With The Common Sense Relationship Between Subsections (b) And (c)

This Court should assume that Congress intended all parts of § 11501, including all parts of subsections (b) and (c), to work together in a congruent fashion. Accordingly, Congress must have intended the relief available under subsection (c) to be coextensive with the discrimination prohibited under subsection (b).

As we explained earlier in this brief, at page 12, relief is available under subsection (c) "*only if* the

ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11051(c) (emphasis added). Subsection (c) thus applies only to taxes on rail transportation property and taxes that can be viewed as equivalent to those on rail transportation property.

Applying subsection (c) is relatively straightforward in a dispute involving generally applicable ad valorem property taxes. The same is true with respect to gross receipts taxes imposed in lieu of property taxes. *See Western Air Lines, Inc. v. Bd. of Equalization*, 48 U.S. 123, 132 (1987) ("The South Dakota Airline Flight Property Tax establishes a method of taxing a particular type of property to the exclusion of any other tax on that property. It therefore stands *in lieu of the generally applicable ad valorem property tax* that had been assessed on most other commercial and industrial property in the State at the time the airline flight property tax was established.").

In lieu taxes can be evaluated under § 11501 in the same manner as property taxes. First, the court would determine the total amount of property tax that would be due on the rail carrier's transportation property by applying the assessment ratios and tax rates for other commercial and industrial property. Second, the court would compare the amount of in lieu taxes paid by the rail carrier to the hypothetical property tax amount to determine if the in lieu taxes paid by the rail carrier exceeded by five or more percent the hypothetical

property taxes. If so, relief would be available under subsection (c); if not, no relief would be available.

In contrast, applying subsection (c) to sales and use taxes would be nonsensical. In no sense are sales and use taxes equivalent to a property tax on rail transportation property. No coherent relationship exists between a tax on a rail carrier's purchase and consumption of tangible personal property (such as diesel fuel) and a tax on "rail transportation property."[16]

Notwithstanding subsection (c), CSX seeks full exemptions from sales and use taxes on its purchase and consumption of diesel fuel. Tellingly, however, CSX fails to discuss or even mention subsection (c) in its brief. In fact, when CSX sets out the "relevant part" of § 11051, it includes only subsections (a) and (b). Br. Pet'r at 1-2. Because it never mentions subsection (c), CSX obviously makes no effort to explain how its proposed remedy is compatible with the limited remedy authorized by subsection (c).

The United States attempts to suggest a more moderate approach than CSX, arguing that the appropriate remedy in a successful challenge under

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[16] Alabama correctly points out that the remedy proposed by CSX—full sales and use tax exemptions on its purchase and consumption of diesel fuel—is contrary to subsection (c). "If Congress intended to prohibit States from granting excise tax exemptions under subsection (b)(4), then Congress should not have left a gaping hole in the remedial provision. Congress should have provided the courts with instructions on how to differentiate between valid and invalid exemptions, as well as guidance on how to remedy the invalid ones." Br. Resp'ts at 38.

subsection (b)(4) is for the court to enjoin only the discriminatory portion of the tax. U.S. Amicus Br. at 24 n.7. But it offers no standard for determining what portion of the tax is discriminatory in the context of a claim alleging exemption discrimination. Nor does the United States explain how enjoining the discriminatory portion of a sales or use tax is within the limited remedy provided by subsection (c). Instead, it merely states that through that subsection "Congress crafted an exception to the Tax Injunction Act, 28 U.S.C. 1341, empowering federal courts to enjoin prohibited forms of state taxation." U.S. Amicus Br. at 3.

The interpretation of subsection (b)(4) offered by CSX and the United States—that it applies to any non-property tax—is incompatible with the *only* relief that is available under subsection (c). Reading § 11501 as a whole, and in a harmonious fashion, this Court should conclude that the relief available under subsection (c) is coextensive with the discrimination prohibited under subsection (b), including subsection (b)(4). Therefore, the Court should hold that Congress intended subsection (b)(4) to apply only to discriminatory gross receipts taxes imposed in lieu of property taxes, and not to sales and use taxes.

### 4. Principles Of Federalism Support Adopting The Interpretation Of Subsection (b)(4) That Is The Least Restrictive Of State Taxing Power

We have shown that Congress could not have intended subsection (b)(4) to address allegedly discriminatory sales and use taxes. There is not one

iota of evidence in the legislative record suggesting that sales and use taxes, let alone sales and use tax exemptions, were a concern of Congress or the rail carriers. But if any doubt exists as to whether Congress intended subsection (b)(4) to reach claims of alleged sales and use tax discrimination, this Court should adopt the interpretation of subsection (b)(4) that is the least restrictive of the States' taxing powers.

Several important principles apply to challenges in federal courts that involve a State's tax system. These principles aid in avoiding an unintended imbalance between federal interests and traditional state prerogatives.

Long ago the Court underscored the fundamental importance of State taxing power. *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873) ("And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence."); *see also Bull v. United States*, 295 U.S. 247, 259 (1935) ("taxes are the life-blood of government"); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (cautioning against subjecting the essential taxing power of a state to "intolerable supervision").

Because § 11501 pre-empts the taxing powers of the States, this Court should be "hesitant to extend the statute beyond its evident scope." *ACF Indus.*, 510 U.S. at 345; *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring) ("We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that

which clearly is mandated by Congress' language."); *Cipollone*, 505 U.S. at 523 (opinion of Stevens, J.); *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986). Therefore, the Court "will interpret a statute to pre-empt the traditional State powers only if that result is 'the clear and manifest purpose of Congress.'" *ACF Indus.*, 510 U.S. at 345 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The strong presumption against pre-emption thus requires a fair but narrow construction of the statutory language being considered. *Cipollone*, 505 U.S. at 523.

Principles of federalism compelled this Court in *ACF Industries* to conclude that "neither subsection (b)(4) nor the whole of § [11501] meets this standard with regard to the prohibition of property tax exemptions." *ACF Indus.*, 510 U.S. at 345 ("Principles of federalism support, in fact compel, our view."). The Court explained why subsection (b)(4) and § 11501 failed to meet the "clear and manifest purpose" standard:

> "Had Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt non-railroad property, we are confident that it would have spoken with clarity and precision. Property tax exemptions are an important aspect of state and local tax policy. It was common at the time § [11501] was drafted, as it is now, for States with generally applicable ad valorem property taxes to exempt various classes of commercial property. . . . Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, § [11501]'s

> silence on the subject—in light of the explicit prohibition of tax rate and assessment ratio discrimination—reflects a determination to permit the States to leave their exemptions in place." *ACF Indus.*, 510 U.S. at 344.

Section 1 of this brief explains why subsection (b)(4) is not plain. Since more than one permissible reading of the subsection is available, the Court should prefer the one that is the least restrictive of State taxing authority. That approach, required by principles of federalism, respects this Court's frequently repeated insistence that "in structuring internal taxation systems 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). State legislatures pursue a host of legitimate interests through their tax systems. This leeway for States should apply in full to the determination of whether Congress intended subsection (b)(4) to apply to sales and use tax systems.

Section 11501 and subsection (b)(4) are silent with respect to sales and use tax systems. Moreover, nothing whatsoever in the legislative history suggests that Congress had any concerns with such systems, let alone sales and use tax exemptions. Neither § 11501, subsection (b)(4), nor the legislative history indicates that Congress intended to pre-empt the States' traditional taxing powers with respect to sales and use taxes. Thus, nothing demonstrates a clear and manifest purpose of Congress to address

allegations of sales and use tax discrimination through subsection (b)(4).

Section 11501 also is a limited exception to the general policy of noninterference with State taxation reflected in 28 U.S.C. § 1341, the Tax Injunction Act. So pervasive is the policy behind the Act that exceptions to the Act should be read narrowly. This Court often has recognized the strength of the policy behind the Act. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) ("the statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations"); *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.").

Here, important principles of federalism strongly caution against concluding that Congress intended through subsection (b)(4) to address alleged discriminatory sales and use tax systems. If Congress had intended to prohibit alleged discriminatory sales and use taxes through subsection (b)(4), and not just taxes imposed in lieu of property taxes, it would have spoken with clarity and set forth an explicit prohibition like those contained in subsections (b)(1)-(3) pertaining to tax rates and assessment ratios. *Cf. ACF Indus.*, 510 U.S. at 344 ("Had Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt nonrailroad property, we are confident that it would have spoken with clarity and precision.").

There is nothing explicit or sufficiently implied in the vague prohibition in subsection (b)(4) to justify finding a manifest and clear intent by Congress to impinge upon the States' sovereign taxing powers in the area of sales and use taxes. Nor through § 11501 has Congress clearly and manifestly expressed any intent to foreclose the States from tailoring their sales and use tax systems to accommodate particular needs. Fairly and narrowly interpreted, subsection (b)(4) should be construed to apply only to in lieu taxes for the reasons explained in Sections 1, 2, and 3 of this brief. This Court should decline to adopt—as CSX and the United States urge—an expansive and virtually unlimited interpretation of subsection (b)(4) that unquestionably would have a significant impact on the States' taxing powers, particularly where such a broad interpretation is unsupported by any clear language in § 11501.

Applying the foregoing principles to § 11501, CSX may not challenge Alabama's sales and use taxes in the federal courts pursuant to subsection (b)(4).

*[end of text on page]*

## CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

RESPECTFULLY SUBMITTED.

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